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Seventh report on diplomatic protection

by John Dugard, Special Rapporteur

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A. Introduction*

1. The International Law Commission completed the first reading of a set of 19 draft articles on diplomatic protection at its fifty-sixth session, held in 2004.[1] The Commission subsequently decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006. By a note dated 19 October 2004, the Secretariat invited Governments to submit their written comments by 1 January 2006. As at 26 January 2006, written comments had been received from the following 11 States: Austria, El Salvador, Guatemala, Mexico, Morocco, the Netherlands, Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), Panama, Qatar, United States of America and Uzebekistan.[2]

2. Since 2000, when the first draft articles on diplomatic protection were approved by the Commission, there has been a steady flow of books (both monographs and new editions of general treatises) and scholarly articles on diplomatic protection, with particular reference to the work of the Commission. A bibliography of these writings appears in the annex to the present report.

3. Many of the post-2000 publications deal with the nature of diplomatic protection and consider the question whether diplomatic protection is a procedure for the protection of the individual's human rights or a mechanism for the protection of the interest of the State exercising diplomatic protection. Some of them seriously question the validity of the rule in the *Mavrommatis Palestine Concessions* case that:

> By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right — its right to ensure, in the person of its subjects, respect for the rules of international law.[3]

Such critics correctly argue that several of the requirements for the exercise of diplomatic protection — such as the continuous nationality rule, the exhaustion of local remedies and the assessment of damages — indicate that the claim is in reality that of the individual and not of the State. This argument, however, fails to take into account the distinction between primary and secondary rules of international law, a distinction which is fundamental to the present draft articles. The individual has a right not to be tortured or not to be deprived of his or her property without compensation. These rights clearly are not the rights of a State. These rights of the individual, the violation of which may give rise to the exercise of diplomatic

* The Special Rapporteur wishes to acknowledge, with gratitude, the assistance of Annemarieke Künzli, PhD Fellow at the University of Leiden, and Alex Smithyman, formerly of New York University and presently of Chen Palmer, Wellington, New Zealand, who served as an intern to the Special Rapporteur in 2005.

[1] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 59.

[2] These comments were published in document A/CN.4/561 (hereinafter referred to as "Comments").

[3] *Mavrommatis Palestine Concessions* (Greece v. United Kingdom), 1924 *P.C.I.J. Series A*, No. 2, p. 12.

protection by his or her national State, belong to the field of primary rules of international law. However, the right of the State to exercise diplomatic protection in response to the violation of such a primary rule of international law by espousing the claim is a secondary rule of international law.[4] As the international legal personality of the individual is incomplete, owing to the limited capacity of the individual to assert his or her rights, the fiction inherent in the *Mavrommatis Palestine Concessions* case is the means employed by international law — a secondary rule — to enforce the primary rule, which protects the undoubted right of the individual. In the light of the fact that the draft articles are premised on the soundness (if not accuracy) of the *Mavrommatis* rule (see, in particular, article 1), little purpose would be served by an examination of criticisms of the rule at this stage. The writings in question do, however, serve to emphasize that diplomatic protection is an instrument which allows the State to become involved in the protection of the individual and that the ultimate goal of diplomatic protection is the protection of the human rights of the individual. In this sense, diplomatic protection and human rights law complement each other.[5] This notion is strongly endorsed by the Netherlands, which urges the Commission to pay closer attention to the position of the individual in the formulation of its draft articles.[6]

4. Some of the literature is critical of decisions of the Commission not to include certain proposals. For instance, criticisms have been directed at the Commission for failing to impose a duty on States to exercise diplomatic protection by way of progressive development.[7] As these matters cannot, and should not, be reopened for discussion at second reading, they are not considered in the present report.

5. Several scholarly reviews deal critically with the language or content of particular provisions in the draft articles. They are considered in the course of the re-examination of such provisions, as are the comments of States.

6. No attempt is made in the present report to draft articles dealing with matters that will need to be included if the draft articles are translated into treaty form, such as signature, ratification and dispute settlement. In this respect, the precedent of the draft articles on responsibility of States for internationally wrongful acts is followed. The fate of the present draft articles is closely bound up with that of the draft articles on responsibility for internationally wrongful acts. If a decision is taken to translate the latter into treaty form, it is probable and desirable that the

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[4] See C. Dominicé, "La prétention de la personne privée dans le système de la responsabilité internationale des Etats" in *Studi di Diritto Internazionale in Onore di Gaetano Arangio-Ruiz* (2004), p. 729; C. Dominicé, "Regard actuel sur la protection diplomatique" in *Liber Amicorum Claude Reymond* (2004), p. 73.

[5] L. Condorelli, "L'évolution du champ d'application de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), p. 1; J.-F. Flauss, "Vers un aggiornamento des conditions d'exercise de la protection diplomatique" in J.-F. Flauss, *La Protection Diplomatique* (2003), p. 29; P. H. Kooijmans, "Is the right to diplomatic protection a human right?" in *Studi di Diritto Internazionale in Onore di Gaetano Arangio-Ruiz* (2004), p. 1975; M. Feria Tinta, "Due process and the right to life in the context of the Vienna Convention on Consular Relations: arguing the *La Grand* case", *European Journal of International Law*, vol. 12, No. 2 (2002), p. 363; M. Pinto, "De la protection diplomatique et la protection des droits de l'homme", *Revue Générale de Droit International Public*, vol. 106, No. 3 (2002), p. 513.

[6] Comments, p. 10.

[7] E. Milano, "Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition?", *Netherlands Yearbook of International Law*, vol. 35 (2004); p. 85, at pp. 94-97; P. H. Kooijmans, note 5 above.

present draft articles be incorporated into any such treaty. If, on the other hand, the draft articles on State responsibility retain their present status as a restatement of the law, it seems inevitable that the present draft articles will serve the same purpose.

7. The present report will examine the draft articles approved by the Commission at first reading in the context of comments, criticisms and suggestions made by Governments and scholars in respect of those articles. Where necessary, an amended or new provision will be proposed to take the place of the previous draft article. Only one major innovation will be proposed. Some members of the Commission, some States and some academic writers have called upon the Commission to include a provision dealing with the payment to a national of compensation received in respect of injury to that national by the State of nationality. A proposal to that effect is included after the examination of the 19 draft articles.

B. Consideration of draft articles

1. Article 1

Definition and scope

Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

8. The comments on article 1 fall into three categories: those calling for clarity in language or changes to the text; those suggesting additions to the commentary; and those calling for a clear distinction to be made between diplomatic protection and consular assistance. The third category is certainly the most important and will be fully considered. Other comments and suggestions may be more easily disposed of.

9. Uzbekistan suggests that the draft articles include a provision indicating the sense in which terms such as "nationality of a legal person", "incorporation" and "damage to property" are used.[8] It also objects to the use of the term "nationality" in respect of legal persons, on the ground that nationality is an attribute of natural and not legal persons.[9] This calls for two comments. First, definitions are dangerous and often create more problems than they solve.[10] It is wiser to explain the meaning of terms in the context of each rule — which the draft articles attempt to do. Second, in law the term "nationality" is used so frequently in respect of legal persons that it is impossible to discard this usage.

10. The Netherlands suggests that it should be made clear that article 1 includes stateless persons and refugees within the meaning of article 8.[11] It is proposed that this suggestion be accepted by an amendment to the text.

11. Guatemala has proposed an addition to paragraph (7) of the commentary on article 1 to make it clear that diplomats and consuls may benefit from diplomatic protection where they act outside their official capacities.[12] This will be done.

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[8] Comments, p. 51. The full comment from Uzbekistan makes the nature of its suggestion clearer.
[9] Comments, p. 12.
[10] "A definition ... often creates more problems than it solves" — Lord Reid in *Brutus v. Cozens* [1972] 3 W.L.R. 521, at p. 525.
[11] Comments, p. 12.
[12] Comments, p. 11.

12. Article 1 makes it clear that "an internationally wrongful act of another State" is a requirement for diplomatic protection. This does not preclude a State from taking steps to protect its nationals before a wrongful act has occurred, but such measures do not qualify as diplomatic protection.[13] The Netherlands has wisely suggested that this matter be clarified in the commentary.[14]

13. The commentary should also make it clear that the reference to "national" in article 1 includes the protection of groups of nationals — as suggested by Condorelli.[15]

14. Several States have suggested that article 1 and its commentary provide greater clarity on the meaning of the terms "diplomatic action" and "other means of peaceful settlement" and that a clear distinction be drawn between diplomatic protection and consular assistance.[16] Academic writings have made the same point. This matter therefore requires careful consideration.

Diplomatic protection and consular assistance

15. International law recognizes two kinds of protection that States may exercise on behalf of their nationals: consular assistance and diplomatic protection.[17] There are, however, fundamental differences between the two and a persistent subject of debate and controversy is the question of which activities by Governments fall under diplomatic protection and which actions do not. This debate is fuelled by an equally persistent misunderstanding of the definition of the term "action" for the purpose of diplomatic protection, resulting in actions being mistakenly classified as an exercise of consular assistance. The problem is not so much what constitutes consular assistance, but the definition of action for the purpose of diplomatic protection to the exclusion of consular assistance.

16. Diplomatic protection is often considered to involve judicial proceedings. Interventions outside the judicial process on behalf of nationals are sometimes not regarded as constituting diplomatic protection but as falling under consular assistance instead. This, however is too narrow a view of diplomatic protection. Any intervention, including negotiation, at inter-State level on behalf of a national vis-à-vis a foreign State should be classified as diplomatic protection (and not as consular assistance), provided that the general requirements of diplomatic protection have been met, i.e., that there has been a violation of international law for which the respondent State can be held responsible, that local remedies have been exhausted and that the individual concerned has the nationality of the acting State. That such a broad view of "action" in the context of diplomatic protection is warranted is

[13] This view is disputed by Condorelli; see "L'evolution du champ d'application de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), p. 3, at p. 7.

[14] Comments, p. 12.

[15] Note 13 above, at pp. 6-7.

[16] Comments, pp. 11 (Austria), 12 (Netherlands, Panama) and 8-9 (El Salvador).

[17] Another source of confusion concerns diplomatic representation and diplomatic protection. They are, however, very different in nature for, as Warbrick and McGoldrick state, "Diplomatic representation covers a wide range of communications from one government to another, in which one expresses its disapproval about some action or inaction of the other. They do not necessarily impute unlawful conflict to the other State ..." — a requirement for the exercise of diplomatic protection. (*International & Comparative Law Quarterly*, vol. 51, No. 3 (July 2002), p. 723, at p. 724).

supported by doctrine[18] and both international[19] and national[20] judicial decisions. Article 1 and its commentary give clear support to such a broad interpretation of diplomatic action. Article 1 provides that diplomatic protection comprises "resort to diplomatic action or other means of peaceful settlement" and paragraph 5 of the commentary states that "'Diplomatic action' covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest, request for an inquiry or for negotiations aimed at the settlement of disputes. 'Other means of peaceful settlement' embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement". It is difficult to draft a more comprehensive provision and commentary on the meaning of diplomatic "action" in the context of diplomatic protection. It is therefore suggested that the present draft article should not be rephrased. The provision does not, however, expressly exclude consular assistance, and this is a matter that requires further attention.

17. Unfortunately, neither Government officials nor legal scholars[21] distinguish clearly between diplomatic protection and consular assistance. There are, however, three structural differences which should act as a guide to the distinction between the two institutions. First, the limited nature of consular functions provided for in the Vienna Convention on Consular Relations of 1963[22] (hereinafter "Vienna Convention") compared with the less limited function of diplomats contained in the Vienna Convention on Diplomatic Relations of 1961;[23] second, the difference in level of representation between consular assistance and diplomatic protection; and third, the preventive nature of consular assistance as opposed to the remedial nature of diplomatic protection. Consuls are seriously limited in respect of the action they may take to protect their nationals by article 55 of the Vienna Convention, which provides that consuls "have a duty not to interfere in the internal affairs of that State". This means, according to Shaw, that "They have a particular role in assisting nationals in distress with regard to, for example, finding lawyers, visiting prisons and contacting local authorities, but they are unable to intervene in the judicial process or internal affairs of the receiving State or give legal advice or investigate a

[18] E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (1919), p. 439; F. S. Dunn, *The Protection of Nationals* (1932), pp. 18-19; L. Condorelli, "L'evolution du champ d'application de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), p. 6.

[19] In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice declared that States are allowed to take up the case of a national "by resorting to diplomatic action *or* international judicial proceedings on his behalf" (1924, *P.C.I.J. Series A*, No. 2, p.12 (emphasis added)). See too *Panevezys-Saldutiskis Railway*, 1939 *P.C.I.J. Series A/B*, No. 76, p. 16; *Nottebohm* (Second Phase), 1955 *I.C.J. Reports*, p. 24; *Reparation for Injuries*, 1949 *I.C.J. Reports*, p. 177.

[20] In the *Rudolf Hess* case, for instance, the German Constitutional Court considered that diplomatic démarches by the German Government were proof that the Government had fulfilled its obligations under the German Constitution, which grants a right to diplomatic protection to German citizens (*I.L.R.*, vol. 90 (1992), p. 387, at p. 396). See, too, *Kaunda and others v. President of the Republic of South Africa and Others*, 2005 (4) South African Law Reports 235 (CC); *International Legal Materials*, vol. 44, No. 1 (January 2005), p. 173.

[21] See E. Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations*, 2nd ed. (1998), p. 33; and L. T. Lee, *Consular Law and Practice* (1991), pp. 138, 148-151, 155 and 167. See generally on this subject, A. Künzli, "Exercising diplomatic protection: the fine line between litigation *démarches* and consular assistance", *Zeitschrift für ausländisches öffentliches Recht und Volkerrecht* (2006, forthcoming).

[22] United Nations, *Treaty Series*, vol. 596, p. 261.

[23] Ibid., vol. 500, p. 95.

crime".[24] This means that consuls are permitted to represent the interests of the national but not the interests of the State in the protection of the national. This is a matter for the diplomatic branch. There is another element of distinction between diplomatic protection and consular assistance. Consular assistance has a largely preventive nature and takes place before local remedies have been exhausted or before a violation of international law has occurred. This allows for consular assistance to be simultaneously less formal and more acceptable to the host State.[25] Consular assistance is primarily concerned with the protection of the rights of the individual and requires the consent of the individual concerned.[26] Indeed, as stipulated in article 36 (1) of the Vienna Convention, consular assistance will only be provided if the individual concerned so requests. A diplomatic démarche on the other hand, is designed to bring the matter to the international, or inter-State, level and is ultimately capable of resulting in international litigation. Moreover, the individual concerned cannot prevent his national State from taking up the claim or from continuing procedures in the exercise of diplomatic protection.

18. The *La Grand* and *Avena* cases[27] require special mention in this connection as they involved both consular assistance and diplomatic protection. In these cases Germany and Mexico, respectively, filed a case against the United States for violation of the Vienna Convention in their own right and in their right to exercise diplomatic protection, as their nationals had individually suffered from non-compliance with the Convention. The merits of the cases before the International Court of Justice thus concerned the exercise of consular assistance while the mechanism utilized to bring the claim was, in both cases, the exercise of diplomatic protection. In *La Grand* the International Court of Justice accepted Germany's claim (partly) as an exercise of its right to diplomatic protection and established that both the State of Germany and the German nationals had suffered from lack of consular assistance.[28] However, in the case of Mexico, the Court decided otherwise and determined that the violations of the Vienna Convention constituted a direct injury to Mexico with the result that diplomatic protection was not necessary as an instrument for bringing the claim. The *La Grand* case is particularly important. The claim Germany presented before the International Court of Justice was based on the failure by the United States to notify without delay the La Grands of their right to consular assistance and the failure to inform the German authorities of the arrest and detention of two German nationals, both obligations deriving from article 36 (1) of the Vienna Convention. Germany argued that it would have been able through the exercise of consular assistance to provide adequate legal assistance and relevant information which, in its turn, perhaps, would have prevented the La Grands from being sentenced to death.[29] The claim was presented both in Germany's own right and in its right to exercise diplomatic protection on behalf of its nationals.[30] The United States contested Germany's claim under diplomatic protection and tried to

[24] *International Law*, 5th ed. (2003), p. 688.

[25] L. Caflisch, "La pratique suisse de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), p. 77.

[26] J. Zourek, "Quelque problèmes théoriques du droit consulaire", *Journal du Droit International*, vol. 90 (1963), p. 4, at pp. 54-55.

[27] 2001, *I.C.J. Reports*, p. 466 and 2004, *I.C.J. Reports*, p. 12, respectively.

[28] 2001, *I.C.J. Reports*, p. 494, para. 77.

[29] Ibid., p. 491, para. 71.

[30] Ibid., p. 481, para. 38 and p. 489, para. 65.

convince the Court that Germany was confusing diplomatic protection and consular assistance and that the Court should therefore declare the claim inadmissible. It argued that the Vienna Convention does not deal with diplomatic protection, but only with consular assistance. In addition, it was claimed that, contrary to the argument of Germany, the Vienna Convention did not protect individual rights and therefore the exercise of diplomatic protection should not be accepted.[31]

The Court rejected the objections presented by the United States and decided that it had jurisdiction to entertain the claim based on both direct and indirect injury. It stated clearly that the general jurisdiction clause under the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes[32] would not "prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national".[33] The Court clearly distinguished between consular assistance and diplomatic protection, accepting that individual rights arising under a treaty on consular relations could be claimed through the vehicle of diplomatic protection.[34] Diplomatic protection is a mechanism that may be resorted to after an internationally wrongful act has occurred causing injury to an alien. Since the non-compliance with the Vienna Convention by the United States gave rise to injury to the German nationals as a result of the violation of their individual rights under that Convention, Germany had invoked the proper procedure to claim redress for the injury.

19. A particular source of confusion of diplomatic protection and consular assistance is article I-10 of the Treaty establishing a Constitution for Europe[35] (hereinafter "Constitution"), which corresponds to article 46 of the Charter of Fundamental Rights of the European Union[36] and article 20 of the Treaty establishing the European Community.[37] The article provides in paragraph 2 (c) that "Citizens of the Union ... shall have ... the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State".[38]

At first sight, the provision may seem non-controversial. It is an expression of the principle of non-discrimination, which is fundamental to the European Union. Since discrimination on the ground of nationality is prohibited within the Union, it is not surprising that Union citizens should also receive equal protection outside the Union. However, by providing for both consular assistance and diplomatic

[31] Ibid., p. 482, para. 40.

[32] United Nations, *Treaty Series*, vol. 596, p. 487.

[33] 2001, *I.C.J. Reports*, pp. 482-483, para. 42; see also O. Spiermann, "The *La Grand* case and the individual as a subject of international law", *Zeitschrift für öffentliches Recht*, vol. 58 (2003), pp. 197-221.

[34] 2001, *I.C.J. Reports*, pp. 492-494, paras. 75-77.

[35] *Official Journal of the European Union*, vol. 47, No. C 310 (16 December 2004), pp. 13-14 (hereinafter Constitution).

[36] Ibid., vol. 43, No. C 364 (18 December 2000), p. 1.

[37] Ibid., vol. 45, No. C 325 (24 December 2002), p. 45.

[38] Although the Constitution has not (yet) entered into force and thus is not yet a binding document, this is the most recent document in which the right to diplomatic protection is provided for. It should be borne in mind that this provision is literally the same as the provision in the European Community Treaty, which of course is binding upon European Union member States.

protection, the provision disregards the fundamental differences between these two mechanisms. In addition, it is particularly problematic in light of the criteria for diplomatic protection.

The principal objection to this provision is that it offends the principle of *pacta tertii nec nocent nec prosunt*. The European treaties are treaties under international law and therefore are governed by article 34 of the Vienna Convention on the Law of Treaties,[39] which provides that treaties are only applicable between the parties to a treaty and are not binding on third States. Thus, any provision contained in an EU treaty, charter or constitution is not binding upon States that are not members of the European Union. Third States are not bound to respect any of the provisions contained in treaties and conventions in force within the European Union and are not obliged to — and with respect to diplomatic protection are unlikely to — accept protection by States that are not the State of nationality of an individual European Union citizen.[40]

A "citizen" of the European Union is not a national of all member States of the European Union, which means that European Union citizenship does not fulfil the requirement of nationality of claims for the purpose of diplomatic protection. The European Union treaty provisions purporting to confer the right to diplomatic protection on all European Union citizens by all member States of the European Union is therefore flawed — unless it is interpreted as applicable to consular assistance only. It is submitted that this is indeed its intention.[41] Although consular assistance is usually exercised only on behalf of a national, international law does not prohibit the rendering of consular assistance to nationals of another State. Since consular assistance is not an exercise in the protection of the rights of a State nor an espousal of a claim, the nationality criterion is not required to be applied as strictly as in the case of diplomatic protection. There is therefore no necessity for a legal interest through the bond of nationality.

20. In theory, the distinction between diplomatic protection and consular assistance is clear. The former is an inter-State intervention conducted by diplomatic officials or Government representatives attached to the foreign ministry which occurs when a national is injured by an internationally wrongful act committed by another State, and the national has exhausted local remedies. It is an intervention designed to remedy an international wrong, which may take many forms, including protest, negotiation and judicial dispute settlement. Consular assistance, on the other hand, involves assistance rendered to nationals (and possible non-nationals) who find themselves in difficulties in a foreign State by career consuls or honorary consuls not engaged in political representation. Such assistance is preventive in the sense that it aims to prevent the commission of an international wrong. The national is provided with consular advice and legal assistance to ensure that he receives a fair trial (if he is charged with a criminal offence) or to protect his personal or proprietary interests in the host State. Despite the clear theoretical distinction between the two institutions there are overlaps (as illustrated by *La Grand* and *Avena*) and failures to distinguish the two (as shown by the European Union

[39] United Nations, *Treaty Series*, vol. 1155, No. 18232.

[40] See C. Storost, *Diplomatischer Schutz durch EG und EU?* (2005), pp. 148-149.

[41] T. Stein, Interim Report on "Diplomatic protection under the European Union Treaty" in International Law Association, Committee on Diplomatic Protection of Persons and Property, Second Report, New Delhi (2002), pp. 36-37.

treaties). In these circumstances, it might be wise to make it clear in article 1 that the Commission is aware of the distinction and wishes it to be maintained. The commentary will also address this issue.

21. It is proposed that article 1 be amended to read:

(1) Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national *or a person referred to in article 8* in respect of an injury to that national *or person* arising from an internationally wrongful act of another State.

(2) *Diplomatic protection shall not be interpreted to include the exercise of consular assistance in accordance with international law.*

2. Article 2

Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

22. There are few comments on this provision. The Netherlands suggests that paragraph (3) of the commentary be deleted or clarified.[42] It does indeed seem to be superfluous and should be deleted.

23. Paragraph (2) of the commentary states that the State has a right to exercise diplomatic protection but is under no duty to do so. This issue has been the subject of several national decisions since the Commission decided not to impose a duty on States to exercise diplomatic protection: *Abbasi and Another v. Secretary of State for Foreign and Commonwealth Affairs*;[43] *Kaunda and Others v. President of the Republic of South Africa and Others*;[44] *and Van Zyl & Others v. Government of the RSA & Others*.[45] These decisions, which give some support to the existence of duty to exercise diplomatic protection under national law, should be considered in the Commentary.

24. In a general comment on the draft articles Austria states:

> It seems that the Commission concentrated only on one aspect of diplomatic protection, namely as a right of a State to make certain claims in the interest of its nationals. This right is, however, balanced by the corresponding obligation of the other States to accept such claims by a State. The legal regime on diplomatic protection also stipulates under which conditions a State has to accept such interventions by another State. Such a view undoubtedly sheds some new light on that legal regime and reveals different aspects of it, which the text of the Commission does not sufficiently take into account.[46]

[42] Comments, p. 13.

[43] (2002) EWCA Civ. 1598; [2002] All ER (D) 70; *International Legal Materials*, vol. 42, No. 2 (March 2003), p. 358.

[44] 2005 (4) South African Law Reports 235 (CC); *International Legal Materials*, vol. 44, No. 1 (January 2005), p. 173.

[45] Judgment of 20 July 2005, TPD case No. 20320/2002 (unreported at time of writing).

[46] Comments, p. 8.

It is suggested that article 2 is the appropriate place to provide for recognition of such a duty on the part of States. Article 2 might therefore be amended to read:

(1) A State has the right to exercise diplomatic protection in accordance with the present draft articles.

(2) *A State is under an obligation to accept a claim of diplomatic protection made in accordance with the present draft articles.*

3. Article 3

Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with draft article 8.

25. The Netherlands proposes that the provision be formulated to read: "The State of nationality is the State entitled to exercise diplomatic protection."[47] How this places "greater emphasis on the perspective of the individual", as suggested by the Netherlands, is difficult to understand. But it is a more elegant formulation than the present article 3 and should be adopted.

26. The Netherlands also states, without any explanation, that this provision is to be seen in the light of developments relating to European citizenship. As explained above, there is a distinction between European "citizenship" and nationality of member States. In directive 2004/38/EC,[48] the concept of European Union citizenship is defined. Although the directive primarily concerns movement and residence of individuals eligible for European Union citizenship *within* the European Union, some of its provisions are relevant to the question of protection *outside* the European Union. While it is stipulated in the preamble (point 3) that "Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence", the operative part defines a European Union citizen as "any person having the nationality of a Member State" (article 2 (1)), nationality thus being a prerequisite for European Union citizenship. In the Constitution it is stated in article I-10 (1) that "citizenship of the Union shall be additional to national citizenship and shall not replace it."[49] These provisions clearly demonstrate that citizenship cannot be equated with nationality and that European Union citizenship should not be interpreted to negate the nationality of individual States, or the power of European Union member States to determine their own nationality laws and criteria for naturalization. In these circumstances it is difficult to see how European Union citizenship can have any bearing on nationality.

27. It is proposed that article 3 should be amended to read:

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[47] Comments, p. 13.

[48] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2005 on the right of citizens of the Union, *Official Journal of the European Union*, vol. 47, No. L 158 (30 April 2004), pp. 77-123.

[49] See N. W. Barber, "Citizenship, nationalism and the European Union", *European Law Review*, vol. 27 (2002), who states that "European citizenship was intended to complement, and not to replace, national citizenship" (p. 241).

(1) *The State of nationality is the State entitled to exercise diplomatic protection.*

(2) Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with article 8.

4. Article 4

State of nationality of a natural person

For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

28. Article 4 has been criticized on the ground that it fails to make it clear that nationality is determined by internal, national law — provided it is not inconsistent with international law.[50] The Commission clearly believed that this was implicit in the formulation of the provision and placed this beyond all doubt in paragraph 1 of the commentary. This may, however, be made clear in article 4 itself.

29. Austria objects to the formulation of article 4 on the ground that "nationality is not acquired by State succession but as a consequence of State succession",[51] and suggests that it should be reformulated accordingly.

30. In order to meet these criticisms article 4 might be reformulated to read:

For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent *or naturalization, or as a consequence of the succession of States, or in any other manner recognized by the law of that State, provided it is not inconsistent with international law.*

5. Article 5

Continuous nationality

1. A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

[50] See the comment by Uzbekistan, Comments, p. 15. Carlo Santulli suggests that the article be reformulated as follows: "A State of nationality means a State whose nationality the individual [sought to be protected] has acquired in good faith in accordance with its internal law." ("Travaux de la Commission du droit international," *Annuaire Français de Droit International*, vol. 47 (2001), p. 349 at p. 371.

[51] Comments, p. 14.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality.

31. Article 5 has elicited the most comments and criticisms from States. The main points of criticism relate to the *dies ad quem* (official presentation of the claim) and to paragraph 2. These will be fully examined. However, there are a number of drafting suggestions that should be dealt with first.

32. Austria objects to the phrase "bringing of the claim" in paragraph 2 on the ground that it suggests a judicial procedure, and is thus more limited than the forms of diplomatic protection described in article 1.[52] It is suggested that the commentary make it clear that such limitation is not intended — if paragraph 2 is retained.

33. The Netherlands suggests that "shall" in paragraph 3 be replaced with "may" because this accords more with the discretionary nature of diplomatic protection.[53] In English "may not" is not more discretionary than "shall not", so this suggestion should not be accepted. The Netherlands also suggests, in order to bring article 5 (3) into line with other provisions, that the word "incurred" be replaced with "caused". This seems wise.

34. The United States suggests the insertion of the word "only" in the first line of paragraph 1 — "A State is entitled to exercise diplomatic protection *only* in respect of ..." — to make it clear that the paragraph intends to limit the right to diplomatic protection found in articles 2 and 3 to claims by persons who meet the continuous nationality requirement.[54] It is recommended that this suggestion be followed.

35. Several States have raised objections to paragraph 2.[55] The most helpful criticism comes from the United States, which argues that the main purpose of paragraph 2 is to protect a person whose nationality has changed as a result of succession. It questions whether laws mandate a change of nationality in the case of marriage and adoption. Indeed, it might have added that the prohibition on the automatic change of nationality of women in the case of marriage contained in the Convention on the Elimination of All Forms of Discrimination against Women[56] reduces still further the likelihood of such changes taking place. The United States believes that the right of diplomatic protection passes in State succession, and the right to diplomatically protect in this situation should not be viewed as an exception to the general requirement. Accordingly it suggests that the issue should be addressed through the addition of a reference to the "predecessor State" in article 5 (1). It is recommended that this proposal be adopted.

36. There is virtually no State practice to support a requirement that nationality be retained continuously from the time of injury to the date of presentation or resolution of the claim (see A/CN.4/506/Add.1, paras. 12-16). Yet, as the United States points out,[57] it is incongruous to draft a rule on continuous nationality that fails to take account of the period between the *dies a quo* and *dies ad quem*. It is

[52] Comments, p. 15.
[53] Comments, p. 16.
[54] Comments, pp. 17, 18.
[55] Comments, pp. 15 (El Salvador), 16-17 (Qatar) and 19-20 (United States).
[56] United Nations *Treaty Series*, vol. 1249, No. 20378, article 9 (1).
[57] Comments, pp. 19-20.

suggested that article 5 (1) be adjusted accordingly. This may be an exercise in progressive development but it seems to be one that is justified.

37. The most controversial aspect of the continuous nationality rule concerns the *dies ad quem* — the final date or stage of the proceedings at which the injured individual must still be a national. The Commission has chosen, on the basis of its reading of State practice, the date of the official presentation of the claim. This position is supported by several States.[58] On the other hand, it is strongly opposed by the United States which argues for the date of the resolution of the claim, that is, the making of the award.[59]

38. The United States relies largely on the decision of an arbitral tribunal of the International Centre for Settlement of Investment Disputes in *The Loewen Group Inc. v. United States of America*, which held that "In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*".[60] This decision, it argues, is supported by a number of other arbitral decisions and claims presented through diplomatic channels in which the person on whose behalf the claim was presented changed his/her nationality *after* the claim was officially presented but before the final resolution of the claim. In each of these cases, the international claim was dismissed or withdrawn when it became known that the claim was being asserted on behalf of a national of a State other than the claimant State. The United States claims that these cases reflect a consistent State practice amounting to a customary rule. Moreover, as a policy matter this rule is preferable, as it avoids a situation where the respondent State owes the claimant State for an injury to a person who is no longer the legal concern of that State.

39. Academic opinion is not helpful on this subject. Some writers favour the date of presentation,[61] while others support the date of the resolution of the claim.[62] Most, however, acknowledge that the *dies ad quem* is uncertain on the ground that there is support for both positions.[63] State practice is equally unhelpful, as treaties

[58] Comments, pp. 15 (Austria and Netherlands) and 16 (Norway, on behalf of the Nordic States).

[59] Comments, pp. 18-19.

[60] Case No. ARB (AF)/98/3, 26 June 2003; *International Legal Materials*, vol. 42, No. 4 (July 2003), p. 811, at para. 225.

[61] E. Borchard, *The Diplomatic Protection of Citizens Abroad* (1919), p. 666.

[62] R. Jennings and A. Watts, (eds.), *Oppenheim's International Law*, 9th ed. (1992), p. 512; C. J. B. Hurst, "Nationality of claims", *British Yearbook of International Law* (1926), p. 163; F. V. García-Amador et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974), p. 82.

[63] Oppenheim's (note 62 above) qualifies support for the date of the award at p. 512, fn. 6 by stating that in some cases the date of presentation of the claim will suffice. See, further, G. Schwarzenberger, *International Law*, 3rd ed. (1957), vol. 1, p. 597; I. Brownlie, *Principles of Public International Law*, 6th ed. (2003), p. 461; A. H. Feller, *The Mexican Claims Commissions 1923-4* (1935), pp. 86 and 96-97; Judge Jessup, separate opinion, *Barcelona Traction* case, 1970 *I.C.J. Reports*, pp. 202-203; E. Borchard, "The protection of citizens abroad and change of nationality", *Yale Law Journal*, vol. 20 (1934), p. 359, at pp. 377-378; E. Borchard, "Protection diplomatique des nationaux a l'etranger", *Annuaire de l'Institut de Droit International*, vol. 36 (1931), pp. 256, 284; C. J. B. Hurst, note 62 above, at pp. 179-180; M. S. Duchesne, "The continuous-nationality-of-claims principle: its historical development and current relevance to investor-state investment disputes", *George Washington International Law Review*, vol. 36 (2004), p. 783, at pp. 799-802; J. Paulsson, *Denial of Justice in International Law* (2005), p. 183.

differ in their formulation of the *dies ad quem*.[64] Although the 1930 Hague Conference for the Codification of International Law is often cited in support of the date of the award,[65] it must be recalled that this "support" is based on a survey of State opinion only, and that of the 20 States that responded to the survey, eight rejected continuous nationality as a rule, three abstained and nine voted in favour (including Great Britain and four of its dominions)![66]

40. Judicial decisions on this subject are also too uncertain to provide evidence of a rule of customary international law. In large part the divergences of judicial opinion may be ascribed to the divergences in treaties regulating such claims. As Umpire Parker stated in *Administrative Decision No. V*:

> When the majority decisions in these cases come to be analysed, it is clear that they were in each case controlled by the language of the particular protocol governing the tribunal deciding them, which language limited their jurisdiction to claims possessing the nationality of the nation asserting them not only in origin but continuously — in some instances to the date of the *filing* of the claim, in others to the date of its *presentation* to the tribunal, in others to the date of the *judgment* rendered, and in still others to the date of the *settlement*. This lack of uniformity with respect to the period of continuity of nationality required for jurisdictional purposes results from each case being controlled by the language of the particular convention governing.[67]

In these circumstances it is not surprising that some decisions favour the date of presentation,[68] some favour the date of the award,[69] and others are inconclusive.[70] Significantly, many of the decisions in favour of the date of the resolution of the claim, and on which the United States relies, involve instances in which the national changed his/her nationality after the presentation of the claim and before the award to that of the respondent State. In such a case it could hardly be expected that the claim would succeed, as the respondent State would then be paying compensation to another State in respect of an injury to its own national![71] This was the case with the

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[64] See the comment of Umpire Parker in *Administrative Decision No. V*, *U.N.R.I.A.A.*, vol. 77, p. 119, at p. 143. See, further, J. H. Ralston, *The Law and Procedure of International Tribunals* (Revised ed. 1926), pp. 164-165; G. H. Hackworth, *Digest of International Law*, vol. 5 (1943), pp. 807-808.

[65] See *Eschauzier* (Great Britain v. Mexico), *U.N.R.I.A.A.*, vol. 5, p. 207, at pp. 210-211.

[66] For a history of this survey of opinion, see Duchesne, note 62 above, pp. 794-797.

[67] *U.N.R.I.A.A.*, vol. 7, p. 199, at p. 143.

[68] *Case of Captain W. H. Gleadell* (Great Britain v. Mexico), reported in G. H. Hackworth, *Digest of International Law*, vol. 5 (1943), p. 805; *Case of F. W. Flack* (Great Britain v. Mexico), reported in A. H. Feller, *The Mexican Claims Commissions 1923-4* (1935), p. 96.

[69] *Eschauzier* (Great Britain v. Mexico), *U.N.R.I.A.A.*, vol. 5 (1931), p. 207; *Benchiton* case (Great Britain v. Spain), *U.N.R.I.A.A.*, vol. 2 (1924), p. 615 (translations in 1923-1924 Annual Digest of Public International Law Cases, p. 189); Guadalupe (unpublished), reported in A. H. Feller, The Mexican Claims Commissions 1923-4 (1935), p. 97; Loewen Group Inc v USA (2003) 42 ILM 1811, para. 225.

[70] *Exors of F. Lederer v German Government*, *Recueil des Decisions des Tribunaux Arbitraux Mixtes*, vol. 3, p. 762 (largely a question of treaty interpretation); *Hawaiian Claims* reported in F. K. Nielson, *American and British Claims Arbitration* (1926), p. 30 (claims withdrawn); *Chopin, French and American Claims Commission, 1880-1884*, vol. 60, Records of Claims (claim withdrawn); *Case of M. and T. Gennes* reported in J. H. Ralston, *The Law and Procedure of International Tribunals* (Revised ed. 1926), p. 165; *Kren Claim*, 20 *I.L.R.* (1953), p. 234.

[71] See the comment to this effect by the United States Supreme Court in *Burthe v. Denis*, 133 US (1890), p. 514, at pp. 520-521.

Ebenezer Barston,[72] the claim of the executors of *F. Lederer*,[73] the *Hawaiian Claims*,[74] *Chopin*,[75] *Gribble*,[76] and, of course, *Loewen*.[77]

41. The United States relies largely on the decision in *Loewen*, but this decision — on this aspect of the case — is seriously flawed. While most of the decision is carefully reasoned and researched (for instance on local remedies), the crucial issue before the tribunal, that of the *dies ad quem*, is disposed of in a manner which gives no indication that the tribunal applied its mind to the matter at all. It simply asserts, without any examination whatsoever of authority (despite the fact that counsel referred the tribunal to the relevant authorities), that under customary international law "there must be continuous national identity from the date of the events giving rise to the claim ... through to the date of the resolution of the claim."[78] The tribunal notes that "the International Law Commission issued a report which proposed eliminating the continuous nationality rule even in cases of diplomatic protection", that "the report itself met with criticism in many quarters"; and that "the [International Law Commission] is far from approving any recodification based on the report".[79] Had the tribunal read the report (A/CN.4/506/Add.1, paras. 12-16), it would have been aware of the dispute over the *dies ad quem*, which features prominently in the report. Moreover, had it, before giving judgment on 26 June 2003, enquired about the work of the Commission on this subject, it would have learned that in 2002 the Commission had adopted a draft article on continuous nationality which gives approval to the date of the official presentation of the claim as the *dies ad quem*.[80] But it made no attempt to do so. Had the tribunal taken the trouble to find out about the controversy surrounding the *dies ad quem* in continuous nationality, it is not unlikely that it would have sought to fashion a more restrictive rule and one that took account of the facts before it — namely a rule that confined itself to making it impossible for a State to present a claim on behalf of a national where that national, subsequent to the filing of the claim, had acquired the nationality of the respondent State.

42. *Loewen* has, rightly, been vigorously criticized. Jan Paulsson states that

> The tribunal's treatment of the continuous nationality issue, considering its outcome — determinative effect — was startling in its succinctness ...[81]
>
> There is nothing in the award to indicate that the arbitrators had considered the special addendum on "continuous nationality and the transferability of claims" prepared by the ILC's rapporteur on diplomatic protection, Professor Dugard, in early 2000. They wrote only that Loewen had *contended* such a report had been issued, and had encountered some criticism. But anyone who reads the report would see that Dugard's extensive review of

[72] G. H. Hackworth, *Digest of International Law*, vol. 5 (1943) p. 805.
[73] 3 *Recueil des Decisions des Tribunaux Arbitraux Mixtes* 763.
[74] See F. K. Nielson, *American and British Claims Arbitration* (1926), p. 30.
[75] *French and American Claims Commission, 1880-1884*, vol. 60, Records of Claims.
[76] Report of Robert S. Hale Esq. [1873, Part II, vol. III] U.S. Foreign Relations 14 (1874).
[77] Note 60 above, at para. 225.
[78] Ibid.
[79] Ibid., para. 236.
[80] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 280.
[81] J. Paulsson, "Continuous nationality in *Loewen*", *Arbitration International*, vol. 20 (2004), p. 213, at p. 214.

> the authorities led him to conclude that there was no established rule in this area. The *dies ad quem* requirement which commended itself to the *Loewen* arbitrators was perhaps the least plausible of a long series of alternative candidates ...
>
> These included: (i) the date on which a government endorses the claim of a national; (ii) the date of initial diplomatic negotiations; (iii) the date of filing the claim; (iv) the date of signature of the treaty referring to the relevant forum; (v) the date of ratification of said treaty; (vi) the date of its entry into force; (vii) the date of presentation of the claim ...; (viii) the date of conclusion of the oral hearings; (ix) the date of judgment (i.e. the *Loewen* solution); and (x) the most extreme, the date of settlement.
>
> Without any indication of being aware of it, the *Loewen* arbitrators adopted the reasoning in the case of *Minnie Stevens Eschauzier* (*Great Britain v. US*), 24 June 1931, V RIAA 207; whose claim was rejected because she lost her British nationality by marriage to an American between the date of conclusion of the oral hearing and the judgment. As the Umpire (Edwin P. Parker) noted in the far more influential *Administrative Decision No. V* (*US v. Germany*), 31 October 1924, VII RIAA 119: (A) the acquisition of nationality transfers allegiance but does not transport existing State obligations and, (B) at any rate, most of the decisions depend on the *lex specialis* of the relevant treaty and therefore do not reflect a general principle; it may well be doubted whether the alleged rule [of continuous nationality] has received such universal recognition as to justify the broad statement that it is an established rule of international law ...[82]

M. S. Duchesne, in similar vein, contends that "there is good reason to discount the weight" of *Loewen*. He continues:

> Whatever other reaction the *Loewen* tribunal's decision might invite, its discussion on the continuous nationality "rule" was, if not cursory, then at least conclusory ... the tribunal's discussion of the continuous nationality issue simply asserts the existence of a rule without citation or even discussion. The tribunal goes so far as to assert: "There is only *limited* dispute as to the history of the requirement of continuous nationality *to the end* of any international proceeding." But ... even those authorities who support treaty continuous nationality as a "rule" have acknowledged that there is much confusion, and little consensus, concerning the point to which original nationality must be maintained. The *Loewen* tribunal's failure to acknowledge, much less deal with, the contrary authority, particularly after substantial briefing by the disputing parties and a full oral hearing on the issue, strongly suggests that ... it approached the issue with a preconceived notion of customary international law and felt little need to put that notion to the test of careful examination.[83]

In these circumstances it is small wonder that the Netherlands "considers that it is not clear whether the *Loewen* case truly reflects the law as it currently stands".[84]

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[82] J. Paulsson, *Denial of Justice in International Law* (2005), pp. 183-184.

[83] "The continuous-nationality-of-claims principle", *George Washington International Law Review*, vol. 36 (2004), p. 783, at p. 808. The reader should be aware that the author was involved in the *Loewen* case.

[84] Comments, p. 16.

43. In the light of the uncertainty surrounding the *dies ad quem* the Commission is required to make a choice between the date of the official presentation of the claim and the date of the resolution of the claim. The authorities are inconclusive and the response of States, while small, favours the date of the presentation of the claim. In these circumstances the Commission must be guided by principle and policy in the exercise of its choice. Principle supports the date of the presentation of the claim as this most favours the interests of the individual. So too does policy, if we equate policy with fairness. Many years may pass between the presentation of a claim and its final resolution and it is unfair to deny the individual the right to change nationality, through marriage or naturalization, during this period. Moreover, the date of presentation is significant as it is the date on which the State of nationality shows its clear intention to exercise diplomatic protection — a fact that was hitherto uncertain. Perhaps the strongest statement on policy is to be found in the *Eschauzier* case (on which the United States relies for its position):

> It might be argued that international jurisdiction would be rendered considerably more complicated if the tribunal had to take into account changes supervening during the period between the filing of the claim and the date of the award. Those changes may be numerous and may even annul one another. Naturalizations may be applied for, and obtained, and may be voluntarily lost. Marriages may be concluded and dissolved. In a majority of cases, changes in identity or nationality will escape the knowledge of the tribunal, and often of the Agents as well. It will be extremely difficult, even when possible, to ascertain whether at the time of the decision all personal elements continue to be identical to those which existed when the claim was presented. Jurisdiction would undoubtedly be simplified if the date of filing were accepted as decisive, without any of the events that may very frequently occur subsequently to that date, having to be traced up to the date of rendering judgment. It can therefore not be a matter for surprise that both *Borchard* (pages 664 and 666), and *Ralston* (section 293), state that a long course of arbitral decisions has established that a claim must have remained continuously in the hands of a citizen of the claimant Government, until the *time of its presentation*.[85]

44. Different policy considerations apply where the national on whose behalf the claim is brought acquires the nationality of the respondent State after the presentation of the claim as occurred in *Loewen* and many of the cases on which the United States relies. In such circumstances fairness dictates that the date of the award be selected as *dies ad quem*, as the contrary position would, in the words of *Loewen*, "produce a result so unjust that it could be sustained only by irrefutable logic or compelling precedent, and neither exists".[86]

45. It is therefore proposed that the Commission retain the official date of presentation of the claim as the *dies ad quem* for the continuous nationality rule but that an exception be made for the case in which the national on whose behalf the claim is brought acquires the nationality of the respondent State after the presentation of the claim. Here the date of the resolution of the claim is the *dies ad quem*.

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[85] *UNRIAA*, vol. 5, p. 207, at p. 209.

[86] *International Legal Materials*, vol. 42, No. 4 (July 2003), p. 848, para. 232.

46. It may be argued that article 5 (3) is superfluous in the light of the discarding of article 5 (2). On the other hand, it is suggested that it may have relevance in the case of change of nationality arising from the succession of States. For this reason it is retained.

47. It is proposed that article 5 should read:

> (1) A State is entitled to exercise diplomatic protection *only* in respect of a person *who was a national of that State, or any predecessor State, continuously from the date of injury to the date of the official presentation of the claim*.
>
> (2) *A State is not entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the presentation of the claim*.
>
> (3) Diplomatic protection *may* not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury *caused* when that person was a national of the former State of nationality and not of the present State of nationality.

6. Article 6

Multiple nationality and claim against a third State

> **1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.**
>
> **2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.**

48. Austria comments that there is no need for paragraph 2 "as there is certainly no doubt that two or more States may jointly act when exercising the right of diplomatic protection". Even if such a clause is omitted "the State to which the claim is presented must accept such a joint démarche".[87] Austria warns that this paragraph will inevitable raise difficult questions about how joint actions are to be conducted or which State is to enjoy priority in bringing a claim. The correctness of its warning is borne out by the comments made by El Salvador, Guatemala, Qatar and Uzbekistan.[88] In these circumstances it seems best to retain only paragraph 1 of article 6.

7. Article 7

Multiple nationality and claim against a State of nationality

> **A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.**

[87] Comments, p. 21.

[88] Comments, pp. 21-22.

49. This provision has elicited little criticism from either scholars[89] or States. Austria and Norway (on behalf of the Nordic States) welcome it.[90] Whereas some States question it as a rule of customary international law,[91] Norway states that it "constitutes a codification of existing customary international law".[92] Some States insist on clarification of the term "predominant",[93] which is explained in the commentary, while Morocco prefers the term "effective" to "predominant".[94] The Commission has, however, made it clear, in the commentary, that it prefers the term "predominant" as it conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another.[95]

It is suggested that article 7 be retained in its present form.

8. Article 8

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

50. There is general support, of varying degrees, for article 8, which is a clear exercise in progressive development.[96] As it is progressive development it is wise to be cautious, perhaps strict, in prescribing conditions for the exercise of diplomatic protection. Thus it is recommended that the Commission should not follow the suggestion of Austria that a refugee qualify for diplomatic protection if, after recognition as a refugee in one European State, he/she assumes lawful residence in another European State.[97] For the same reason it is recommended that the Nordic proposal[98] that "lawful and habitual" residence as a requirement be replaced with "lawfully staying" not be followed. Conversely, Ukbekistan's proposal[99] that

[89] Cf. C. Santulli, "Travaux de la Commission du droit international", *Annuaire Français de Droit International* (2001), pp. 369-378.

[90] Comments, pp. 22-23.

[91] Qatar (Comments, p. 23) and possibly Morocco (Comments, p. 23).

[92] Comments, p. 23.

[93] El Salvador (Comments, p. 22), Uzbekistan (Comments, p. 23).

[94] Comments, p. 23.

[95] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 7, para. (5).

[96] The United States requests (Comments, p. 51) that it be made clear that this is an exercise in progressive development. This is done in paragraph (2) of the commentary. (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 8).

[97] Comments, p. 24.

[98] Comments, p. 26.

[99] Comments, p. 26. Ukbekistan's other suggestion that "and has been granted asylum" be added after "as a refugee" in para. 2 is unnecessary to consider as this issue is already covered by the requirement of recognition as a refugee contained in para. 2.

"lawful and permanent residence" be required goes too far in the other direction and should not be accepted.

51. There is a dispute over the Commission's decision to adopt a flexible approach to the meaning of "refugee" and not to confine it to refugees as defined in the 1951 Convention Relating to the Status of Refugees.[100] Austria argues that one cannot expect a respondent State to accept a claim for diplomatic protection on behalf of a person characterized as a refugee by the claimant State without strict regard for the international definition.[101] The Nordic States, on the other hand, argue "that a State may exercise diplomatic protection on behalf of persons fulfilling the requirements of territorial connection to the State exercising diplomatic protection, and which in that State's judgement clearly is in need of protection without necessarily formally qualifying for status as a refugee".[102] Although this matter concerns the commentary rather than the formulation of article 8, it is an important matter of principle. The Nordic States see the subject entirely from the perspective of the claimant State, while Austria, wisely, warns that the respondent State may refuse to recognize the right of a State to exercise diplomatic protection on behalf of a refugee who does not strictly qualify as a refugee. The Special Rapporteur would appreciate guidance on this subject from the Commission.

9. Article 9

State of nationality of a corporation

For the purposes of diplomatic protection of corporations, the State of nationality means the State under whose law the corporation was formed and in whose territory it has its registered office or the seat of its management or some similar connection.

52. The comments on the provision raise two important issues. First, the final phrase "or some similar connection" may be interpreted as requiring a genuine link between the corporation and the State exercising diplomatic protection. Secondly, there is the problem of the corporation "formed" (incorporated) in one State but with a registered office in another State. Which State may exercise diplomatic protection?

53. In its commentary on article 9 the Commission states that "the registered office, seat of management or 'some similar connection' should not ... be seen as forms of a genuine link ... The phrase 'or some similar connection' must be read in the context of the 'registered office or the seat of its management', in accordance with the *eiusdem generis* rule of interpretation, which requires a general phrase of this kind to be interpreted narrowly to accord with the phrases that precede it. This means that the phrase is to have no life of its own. It must refer to some connection similar to that of 'registered office' or 'seat of management'".[103] Despite this explanation it seems certain that the phrase "or some similar connection" will be construed as requiring some form of genuine link. This is demonstrated by the

[100] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 8, para. (8).

[101] Comments, p. 24. See, too, Comments, pp. 24 (El Salvador) and 26 (Qatar).

[102] Comments, p. 25.

[103] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 9, paras. (5) and (6).

comments of Austria, the Netherlands and Qatar.[104] It is recommended that the phrase be deleted, as no amount of explaining in the commentary will succeed in preventing it from being read as synonymous with the requirement of a genuine link.

54. Several States raise the question of whether a State may be diplomatically protected if it has its registered office in a State other than that in which it is formed (incorporated).[105] This is a fair question, as the present language of article 9 suggests that only the State in which the corporation is formed *and* in whose territory it has "its registered office or the seat of its management or some similar connection" may exercise diplomatic protection. This interpretation is confirmed by the fact that article 9 speaks of "*the* State of nationality" and paragraph (7) of the commentary states that "This language is used to avoid any suggestion that a corporation might have dual nationality". This is an error that must be rectified. As the Netherlands rightly points out,[106] corporations are often formed in more than one State and have registered offices in more than one State. This is a fact of commercial life that cannot be ignored or wished away. It is suggested that article 9 requires a substantial revision; and it is suggested that Guatemala's proposal might provide the solution.[107] This would require recognition of the possibility of dual nationality of corporations and adoption of the test of "closest connection", "effective nationality" or "predominant nationality" (to accord with article 7) as an indication of which State may exercise diplomatic protection. (Guatemala's suggestion that it should be made clear that the term "corporation" means "limited liability company" is already taken care of in paragraph (2) of the commentary.)

55. It is proposed that article 9 be amended to read:

> (1) *A State is entitled to exercise diplomatic protection in respect of an injury to a corporation which has the nationality of that State.*
>
> (2) *For the purposes of diplomatic protection of corporations, a corporation has the nationality of the State under whose law the corporation was formed or in whose territory it has its registered office or the seat of its management.*
>
> (3) *When two States are entitled to exercise diplomatic protection in terms of paragraph 2, the State whose nationality is predominant shall exercise that protection.*

10. Article 10

Continuous nationality of a corporation

> **1. A State is entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and is its national at the date of the official presentation of the claim.**
>
> **2. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of that State.**

[104] Comments, pp. 27 and 29.
[105] Comments, pp. 27 (El Salvador), 28 (Guatemala) and 29 (Morocco and the Netherlands).
[106] Comments, p. 29.
[107] Comments, p. 28.

56. The continuous nationality rule has already been dealt with exhaustively in respect of article 5. It is therefore unnecessary to rehearse the arguments in favour of amending paragraph 1 to include the words "only" and "continuously" and to provide for the case of the predecessor State.[108] Nor is it necessary to repeat the arguments in favour of retaining the date of the official presentation of the claim as the *dies ad quem* except where the national sought to be protected acquires the nationality of the respondent State after the presentation of the claim.

57. The United States, however, objects to paragraph 2 of article 10,[109] arguing that the protection of extinct corporations should not be an exception to the rule of continuous nationality. It claims that "a State may continue to exercise protection with respect to the claims of a corporation so long as the corporation retains a legal personality, which can be as bare as the right to sue or be sued under municipal law. Many municipal systems allow for corporations to continue to raise and defend claims that arose during corporate life for a finite period of time after dissolution, meaning that legal personality persists until this period expires. Thus, the problem of espousing claims of extinct corporations would arise infrequently, as the vast majority of claims can be considered while the corporation maintains a legal personality".[110] It adds that sound policy considerations in municipal law allow the legal personality of corporations to lapse: "Municipal survival and corporate wind-up statutes include a finite wind-up period to allow those involved with a corporation to obtain the benefits of finality, knowing that after the wind-up period has ended claims for and against the corporation will cease".[111] In support of its argument the United States refers to laws in the United States, the United Kingdom, Canada and France which allow corporations to sue and be sued for several years following dissolution.

58. Unfortunately, the Unites States fails to consider the concerns raised in this connection by judges (notably the American judge, Judge Jessup in *Barcelona Traction*[112]), tribunals and scholars, referred to in the commentary and the fourth report on diplomatic protection.[113] In the light of the failure to refute (or even to consider) these authorities, and in the absence of a wider comparative survey of corporate law and practice to establish that many legal systems allow corporations to sue and be sued following dissolution, the inclination of the Special Rapporteur is to retain paragraph 2, albeit *ex abundanti cautela*.

59. The revised article 10 should therefore read:

> (1) A State is entitled to exercise diplomatic protection *only* in respect of a corporation *that was a national of that State, or any predecessor State, continuously from the date* of injury to the date of the official presentation of the claim.

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[108] The concerns of Austria (Comments, p. 30) that article 10 does not provide for the case of State succession are met by the inclusion of reference to the "predecessor State".

[109] Comments, pp. 30-31.

[110] Ibid.

[111] Ibid.

[112] 1970 *I.C.J. Reports*, p. 193. See also the opinions of Judges Gros (p. 277), and Fitzmaurice (pp. 101-102) and Judge ad hoc Riphagen (p. 348).

[113] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 10, para. (4), notes 102-104, and A/CN.4/530, paras. 93-105.

(2) *A State is not entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.*

(3) Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of that State.

11. **Article 11**

Protection of shareholders

The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:

(a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or

(b) The corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing injury, and incorporation under the law of the latter State was required by it as a precondition for doing business there.

60. Article 11, subparagraph (a), seeks to give effect to the *dictum* in *Barcelona Traction* in which the International Court of Justice acknowledged the existence of an exception to the general rule that only the State of incorporation may protect a corporation (and its shareholders) where the company has ceased to exist.[114] The Commission restricted the scope of this exception by requiring that the corporation must have ceased to exist "for a reason unrelated to the injury". Austria rightly points out that this restriction "makes very little sense, since the State where the company is terminated differs from the injuring State".[115] The Special Rapporteur shares this view and suggests that this phrase be deleted.

61. Austria's further suggestion that article 11, subparagraph (a), be amended to read "State of nationality" instead of "State of incorporation"[116] cannot be accepted as it is intended to emphasize that the law of the State of incorporation is to govern. This will usually be the same as the State of nationality but need not always be so in the light of the proposed revision of article 9.

62. The United States proposes that article 11, subparagraph (a), be deleted because it creates the anomalous situation of granting States of shareholders a greater right to espouse claims of a corporation than the State of incorporation itself.[117] It states that the commentary provides no justification for such an exception. However, the United States fails to consider the reasoning of the International Court of Justice in *Barcelona Traction* in favour of such an exception.[118] Article 11 aims to codify the law as set out in *Barcelona Traction*, for

[114] 1970 *I.C.J. Reports*, pp. 41–42 (paras. 64–68).
[115] Comments, p. 52.
[116] Ibid.
[117] Comments, p. 53.
[118] 1970 *I.C.J. Reports*, pp. 41–42 (paras. 64–68).

which it has been congratulated by other States.[119] In these circumstances it is suggested that article 11, subparagraph (a), be retained, subject to the deletion suggested by Austria.

63. The United States objects to article 11, subparagraph (b), on grounds of law and public policy. As to the law, it argues that the cases on which the Commission relies as evidence for this exception are based on "special agreement between two States granting a right to shareholders to claim compensation, or an agreement between the injuring State and its national corporation granting compensation to the shareholders. As a result of those agreements, the abovementioned cases provide little support for the existence of a customary international law rule allowing States to espouse claims of shareholders against the State of incorporation where incorporation was mandated for doing business in the State".[120] On the subject of policy, the United States claims: "this exception would create a regime where shareholders of corporations incorporated in a State have greater rights to seek diplomatic protection of their claims in that State than shareholders of foreign-owned corporations, who would have to rely on the corporation's State to pursue claims. It is not clear that such a result is just."[121]

64. The Special Rapporteur finds himself unable to agree with the above criticisms for the following reasons:

(a) The fact that the cases relied on for this exception are based on special agreements does not deprive them of value in the law-formation process. The twin requirements for the creation of a customary rule are *usus* and *opinio juris*. The settlement of claims by special agreement between the State of incorporation and the State of nationality of the shareholders provides evidence both of State practice (*usus*) and of a sense of obligation on the part of the respondent State to settle the claim (*opinio juris*);

(b) The United States fails to consider the wealth of judicial opinion in favour of such an exception. For example, the separate opinions of judges Wellington Koo,[122] Jessup,[123] Tanaka[124] and Fitzmaurice[125] in *Barcelona Traction*. Nor does it consider whether the ELSI case[126] lends support to the exception as suggested in the commentary[127] and the fourth report.[128]

(c) Although doctrine is divided on this subject, there is considerable support for the proposed exception;

(d) Draft articles 9, 11 and 12 seek to codify the law expounded by the International Court of Justice in *Barcelona Traction*. This exception is part of the principles on this subject expounded by the Court.

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[119] Comments, pp. 32 (Nordic States) and 34 (the Netherlands).
[120] Comments, pp. 34-35.
[121] Comments, p. 35.
[122] Preliminary objections, 1964 *I.C.J. Reports*, p. 58, para. 20.
[123] 1970 *I.C.J. Reports*, pp. 191-193.
[124] Ibid., p. 134.
[125] Ibid., pp. 72-75.
[126] 1989 *I.C.J Reports*, p. 15.
[127] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 11, para. (10).
[128] A/CN.4/530, paras. 81 and 82.

(e) The United States submission is, possibly, weakest in respect of policy. As Norway states (on behalf of the Nordic countries):

> A State should not be allowed to require foreign interests to incorporate under local law as a condition for doing business in that State and then plead such incorporation as the justification for rejecting the exercise of diplomatic protection from the State of nationality of the foreign interests.[129]

This echoes the reply of the United Kingdom to the Mexican argument in *Mexican Eagle* that a State (*in casu* the United Kingdom) might not intervene on behalf of its shareholders in a Mexican company:

> If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad.[130]

A company compelled to incorporate in a State as a precondition for doing business there has been described as a "Calvo corporation" as incorporation protects the host State as firmly as the Calvo clause. Hence the comment of the Netherlands that "the State of nationality of the shareholder in cases of Calvo [corporations] would be entitled to exercise diplomatic protection".[131] Policy considerations of this kind are more powerful than those raised by the United States.

(f) A final weakness in the United States position is that it makes no attempt to distinguish between corporations that freely and voluntarily incorporate in a State and those that are compelled to incorporate in such State as a result of law or political pressure. This distinction, which is central to article 11, subparagraph (b),[132] is not considered by the United States.

65. The Special Rapporteur has been guided in his formulation of the present draft articles largely by State practice, judicial decisions and general principles. On article 11, subparagraph (b), he has been strongly influenced in favour of such an exception by United States practice (*Delagoa Bay Railway Co*,[133] *El Triunfo* (1902)[134]), judicial decisions involving the United States (*ELSI case*[135]), judicial opinion (Judge Jessup in *Barcelona Traction*[136]) and general principles (opposition to Calvo clause and "Calvo corporation"). He therefore finds it strange that the United States should denounce an exception which is so strongly supported by American authority. In summary, it is suggested that the reasons advanced for the deletion of article 11, subparagraph (b), are unconvincing and that it should be retained.

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[129] Comments, p. 34.
[130] M. Whiteman, *Digest of International Law*, vol. 8, pp. 1273-1274.
[131] Comments, p. 34.
[132] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 11, para. (8).
[133] J. B. Moore, *Digest of International Law*, vol. 6 (1906), p. 647.
[134] *U.N.R.I.A.A.*, vol. 15 (1991), p. 467.
[135] 1989 *I.C.J. Reports*, p. 15.
[136] 1970 *I.C.J. Reports*, pp. 191-193.

66. The Nordic States object to the requirement in article 11, subparagraph (b), that, in order to succeed in the exception it must be shown that incorporation "under the law" of the wrongdoing State was required as a precondition for doing business there. It suggests that "there are ... as a part of the progressive development of international law, good reasons to extend this exception also to cases where the requirement of incorporation is not a formal one, but follows from pressure of informal or political nature on the foreign interests".[137] The Nordics suggest that this matter be dealt with in the commentary. It is, however, recommended that it be dealt with in the text of article 11, subparagraph (b), itself. In most instances, the Government will place political pressure on foreign investors to incorporate in the host States without the backing of local law. Inevitably such pressure will be as effective as the letter of the law.

67. Suggestions by the Netherlands[138] in favour of consistency of language and by Austria[139] for an explanation of the meaning of "injury" in the context of article 11, subparagraph (b), in the commentary, should be acceded to.

68. It is proposed that article 11 be revised to read:

> The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:
>
> (a) The corporation has ceased to exist according to the law of the State of incorporation [for a reason unrelated to the injury]; or
>
> (b) The corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing *the* injury, and incorporation [under the law of the latter State] was required by it as a precondition for doing business there.

12. Article 12

Direct injury to shareholders

> **To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.**

69. The United States suggests that this provision is superfluous, as the rights of shareholders are already covered by articles 2 and 3.[140] This is correct. However, if the draft articles are to fully codify the principles expounded in *Barcelona Traction*[141] it should be retained. A further advantage of retaining it is that the commentary to this provision ensures that the commentaries — and the draft articles on the protection of corporations and shareholders — provide a comprehensive picture of the law on this aspect of diplomatic protection. The Special Rapporteur makes no recommendation to the Commission on this subject, but expresses a mild preference for retention.

[137] Comments, p. 34.
[138] Comments, p. 34.
[139] Comments, p. 33.
[140] Comments, p. 35.
[141] 1970 *I.C.J. Reports*, p. 36, paras. 46-47.

13. **Article 13**

Other legal persons

The principles contained in draft articles 9 and 10 in respect of corporations shall be applicable, as appropriate, to the diplomatic protection of other legal persons.

70. Article 13 is intended to extend the principles relating to the diplomatic protection of corporations to other legal persons. It is not intended that such other legal persons include natural persons.[142] On the other hand, as pointed out by Guatemala,[143] legal persons or companies other than corporations (that is profit-making enterprises with limited liability whose capital is represented by shares) may have shareholders who are liable for the company's debts up to but not exceeding the level of their equity contribution. The principles covered in articles 11 and 12 are applicable to them. Consequently, the reference to articles 9 and 10 should be extended to include articles 9 to 12. The Special Rapporteur fails to understand why the independence of non-governmental organizations would be compromised by diplomatic protection, as suggested by Qatar.[144]

71. Article 13 should therefore be revised to read:

The principles contained in draft articles *9 to 12* in respect of corporations shall be applicable, as appropriate, to the diplomatic protection of other legal persons.

14. **Article 14**

Exhaustion of local remedies

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 16, exhausted all local remedies.

2. "Local remedies" means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

72. Apart from suggestions relating to the redrafting of the commentary by the Netherlands,[145] the only comment affecting article 14, paragraph (1), is raised by the United States. It points out that in the *ELSI* case the International Court of Justice "acknowledged that a claim could be exhausted for international law purposes when the essence of the claim was considered by municipal tribunals, irrespective of whether the same person or entity pursued the municipal claim as was being diplomatically protected".[146] It accordingly suggests that paragraph 1 be reformulated to exclude the requirement that the injured person be the party

[142] Cf. the suggestion to this effect by El Salvador (Comments, p. 36).
[143] Comments, p. 36.
[144] Ibid.
[145] Comments, p. 37.
[146] Comments, p. 38. For the United States position under human rights treaties, see H. G. Schermers, "Exhaustion of local remedies" in N. Ando et al. (eds.), *Liber Amicorum Judge Shigeru Oda* (2002), p. 947 at pp. 954-958.

exhausting local remedies. The Special Rapporteur is indebted to the United States for this helpful suggestion which is accordingly recommended to the Commission.

73. The Netherlands has suggested a minor amendment to paragraph (2) to bring it into line with article 11, subparagraph (b).[147]

74. It is proposed that article 14 be revised to read:

> 1. *A State may not bring an international claim in respect of an injury to a national or other person referred to in draft article 8 before local remedies have been exhausted, subject to draft article 16.*
>
> 2. "Local remedies" means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for *causing* the injury.

15. Article 15

Category of claims

> **Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.**

75. The decision of the International Court of Justice in *Avena*[148] adds considerably to the law on the distinction between direct and indirect injuries in the context of the exhaustion of local remedies rule, but it does not affect the validity of the formulation of the principle contained in article 15. Obviously, it will require discussion in the commentary. Austria raises a question about the title of article 15. "Mixed claims" might be a more appropriate title. No change is recommended to article 15 itself.

16. Article 16

Exceptions to the local remedies rule

> **Local remedies do not need to be exhausted where:**
>
> **(a) The local remedies provide no reasonable possibility of effective redress;**
>
> **(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;**
>
> **(c) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable;**
>
> **(d) The State alleged to be responsible has waived the requirement that local remedies be exhausted.**

[147] Comments, p. 34.

[148] (Mexico v. US), 2004 *I.C.J. Reports*, p. 12, particularly at para. 40. See also the separate opinions of Judges Parra-Aranguren (paras. 27-28) and Vereshchetin (paras. 7-11). See, further, A. Künzli, "Case concerning Mexican nationals" (2005), *Leiden Journal of International Law*, vol. 18; and E. Milano "Diplomatic Protection and Human Rights before the I.C.J.", *Netherlands*

76. Mexico makes two general comments on article 16.[149] First, it draws attention to the exception to the exhaustion of local remedies rule in the case of a likely repetition of the injury. Although this exception receives separate attention by Amerasinghe[150] it seems to be covered by subparagraph (a) and will be dealt with in the commentary to subparagraph (a). Mexico also proposes that a provision be included on the burden of proof in respect of the local remedies rule. It will be recalled that the Commission decided not to include such a provision.[151] It may, however, be wise to deal with this matter in the commentary.

Subparagraph (a)

77. It will be recalled that when the Commission debated subparagraph (a) it had three options before it: obvious futility; no reasonable prospect of success; and no reasonable possibility of effective redress.[152] It showed a preference for the third option, which now features in subparagraph (a). The United States[153] calls upon the Commission to reconsider its decision and to adopt the futility rule on the ground that it more accurately reflects customary international law[154] and is supported by policy considerations which require that "in all but the most extreme circumstances a State has the opportunity to rectify within its own legal system violations of international law".[155] The United States therefore proposes the following provision:

> Local remedies do not need to be exhausted where the local remedies are obviously futile or manifestly ineffective. Exhaustion of local remedies is not obviously futile or manifestly ineffective where a forum was reasonably available to provide effective redress.

While the Special Rapporteur does not favour the reopening of issues that have already been decided, it must be recalled that the futility rule did enjoy some support in the Commission. It is therefore suggested that the Commission reconsider this matter. However, it should be aware of the arguments raised against the futility rule referred to in the commentary[156] and the third report (A/CN.4/523, paras. 18-38). As shown in the third report, the "obvious futility" test, first expounded in the *Finnish Ships Arbitration*,[157] was not followed in the *ELSI* case,[158] and has been criticized by writers.[159] The main objection to this test is that it suggests that the

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Yearbook of International Law, vol. 35 (2004), p. 85, at pp. 128-130.

[149] Comments, pp. 40-41.

[150] *Local Remedies in International Law*, 2nd ed. (2004), p. 212.

[151] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 252.

[152] Ibid., para. 178.

[153] Comments, pp. 41-43.

[154] See Amerasinghe, note 150 above, p. 206: "The test is obvious futility or manifest ineffectiveness, not the absence of a reasonable prospect of success or the improbability of success, which are both less strict tests."

[155] Comments, p. 43.

[156] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 16, paras. (2) and (3).

[157] *U.N.R.I.A.A.*, vol. 3 (1934), p. 1479 at p. 1504.

[158] 1989 *I.C.J. Reports*, p. 14, at pp. 46-47 (paras. 59, 62).

[159] C. F. Amerasinghe, "The local remedies rule in appropriate perspective", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 36 (1976), p. 726, at p. 752; G. Simpson and H. Fox, *International Arbitrations* (1959), p. 114; D. Mummery, "The content of the duty to exhaust local remedies", 58 *A.J.I.L.* (1964), p. 389, at p. 401.

ineffectiveness of the local remedy must be ex facie "immediately apparent". In order to overcome this, Sir Hersch Lauterpacht suggested introducing the element of "reasonableness" into the test,[160] which allows a court to examine whether, in the circumstances of the particular case, an effective remedy was a reasonable possibility. This was the text preferred by the Commission in 2002 and one that is still advocated by the Special Rapporteur.

78. Should the Commission decide not to accept the proposal of the United States, it should consider the Austrian proposal to insert the word "available" into subparagraph (a) to bring it into line with article 44[161] of the draft articles on responsibility of States for internationally wrongful acts.[162]

Subparagraph (c)

79. Two very different proposals are made in respect of subparagraph (c). Austria proposes that the first part of the paragraph be dropped and that it be confined to the situation where the circumstances of the case make the exhaustion of local remedies unreasonable.[163] The United States, on the other hand, proposes that only the first part of the paragraph be retained and that it be rewritten to provide:

> Local remedies do not need to be exhausted where there is no relevant connection between the injured person and the State alleged to be responsible.[164]

The Special Rapporteur agrees with the proposal of the United States. The main purpose of subparagraph (c) was to provide for an exception to the local remedies rule where the injured person has no voluntary connection with the State alleged to be responsible for the injury — as in the case of cross-border pollution or straying aircraft.[165] Some members of the Commission then raised other situations in which it might not be necessary to exhaust local remedies, such as denial of entry to the territory of the respondent State or prohibitive costs.[166] The second part of subparagraph (c) was adopted to cater for such situations. However, as the United States points out, such situations are already covered by subparagraph (a). It is therefore proposed that the United States proposal be adopted, subject to the insertion of a phrase that makes it clear that the relevant connection must be absent at the moment of injury, as proposed by Austria.[167]

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[160] *Norwegian Loans* case, 1957 *I.C.J. Reports*, p. 9, at p. 39.

[161] "The responsibility of a State may not be invoked if ... (b) the claim is one to which the exhaustion of local remedies applies and any available and effective remedy has not been exhausted."

[162] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 76.

[163] Comments, p. 43.

[164] Comments, p. 44.

[165] The United States suggests that the commentary elaborate further on the absence of a relevant connection in the case of overflight (Comments, pp. 44-45).

[166] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 16, para. (11), for further examples.

[167] Comments, p. 43.

Subparagraph (d)

80. Subparagraph (d) does not distinguish between express and implied waivers. The commentary does, however, make it clear that waiver may be implied where the intention to waive local remedies is clear.[168] This commentary will be redrafted to take account of Guatemala's helpful suggestion on this subject.[169]

81. It is proposed that article 16 be considered in the following form:

> Local remedies do not need to be exhausted where:
>
> EITHER
>
> (a) The local remedies provide no reasonable possibility of *available and* effective redress;
>
> OR
>
> (a) *The local remedies are obviously futile or manifestly ineffective. Exhaustion of local remedies is not obviously futile or manifestly ineffective where a forum was reasonably available to provide effective redress;*
>
> (b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;
>
> (c) *There was no relevant connection between the injured person and the State alleged to the responsible at the time of the injury;*
>
> (d) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

17. **Articles 17 and 18**

Article 17

Actions or procedures other than diplomatic protection

> **The present draft articles are without prejudice to the rights of States, natural persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.**

Article 18

Special treaty provisions

> **The present draft articles do not apply where, and to the extent that, they are inconsistent with special treaty provisions, including those concerning the settlement of disputes between corporations or shareholders of a corporation and States.**

82. Uzbekistan proposes that the heading to this part should be "Other provisions" rather than "Miscellaneous provisions".[170] This should be considered.

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[168] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 16, para. (16). For this reason there is no need to include an express provision on implied waiver, as suggested by Uzbekistan in Comments, p. 46.

[169] Comments, p. 45.

[170] Comments, p. 46.

83. As proposals have been made for the merger of articles 17 and 18,[171] these two provisions will be considered together. Articles 17 and 18 serve the same purpose: to make it clear that the present draft articles do not affect, nor are they directly affected by, other procedures or mechanisms, under customary international law or treaty law, which provide methods for the assertion of rights or the settlement of claims. At first blush it might seem wise to merge the two provisions. Indeed the fifth report recommended such a merger in an article that read:

> These articles are without prejudice to the rights of States or persons to invoke procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act [that might give rise to a claim for diplomatic protection by the State of nationality of the injured person].[172]

However, it seems, on reflection, that in the light of the very different interests that articles 17 and 18 seek to serve, that the wisest course would be to retain two separate provisions.

84. Article 17 is essentially designed to ensure that the institution of diplomatic protection does not interfere with or obstruct the protection of human rights by other means. The Commission acknowledges that diplomatic protection is but one means for the protection of human rights, and a very limited one seeing that it is confined to the protection of the human rights of nationals. Other procedures for the protection of human rights are not limited in this respect. Human rights treaties confer rights and grant remedies to all humans whose human rights are violated, irrespective of nationality. Moreover, new developments in international law allow a State to protect — by protest, negotiation, arbitration and judicial proceedings[173] — both nationals and non-nationals subjected to the violation of human rights norms (with the status of *jus cogens*[174] or which qualify as obligations *erga omnes*[175]) in foreign countries.[176] This was recently emphasized by Judge Simma in the *Case concerning Armed Activities on the Territory of the Congo* (DRC v. Uganda),[177] in which he held that developments of this kind in international law would have made it possible for Uganda to protect both nationals and non-nationals whose human rights were threatened by the army of the Democratic Republic of the Congo at Kinshasa airport.

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171 Qatar and El Salvador (Comments, p. 47). See also the Netherlands (Comments, p. 50).

172 A/CN.4/538, section D.2.

173 Subject of course to the existence of a jurisdictional link. But this qualification is equally applicable to diplomatic protection.

174 See articles 40, 41 and 48 of the draft articles on responsibility of States for internationally wrongful acts in *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77.

175 *Barcelona Traction* case, 1970 *I.C.J. Reports*, p. 32.

176 See further on this subject, G. Gaja "Is a State specially affected when its national's human rights are infringed?" in L.-C. Vohrah et al. (eds.), *Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese* (2003), p. 373; G. Gaja, "Droits des États et droits des individus dans le cadre de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), p. 63; L. Condorelli, "L'évolution du champ d'application de la protection diplomatique" in *La Protection Diplomatique*, p. 3; and C. Forcese, "Shelters from the storm: rethinking diplomatic protection of dual nationals in modern international law", *George Washington International Law Review*, vol. 37 (2005), p. 469, at pp. 497-498.

177 International Court of Justice, unreported judgment of 19 December 2005, separate opinion, paras. 17-41. See also the separate opinion of Judge *ad hoc* Kateka, para. 69.

85. Unfortunately the purpose of article 17 has not been fully understood. Enrico Milano has interpreted the relationship between the 2001 articles on responsibility of States for internationally wrongful acts and the 2004 draft articles on diplomatic protection to mean that the right of a State to intervene under article 48(1)(b) of the articles on responsibility of States for internationally wrongful acts on behalf of non-nationals whose *jus cogens* rights have been violated is limited by the draft articles on diplomatic protection, which require proof of nationality.[178] He reaches this conclusion by interpreting article 48 to be subject to article 44, which provides that the responsibility of a State may not be invoked if "the claim is not brought in accordance with any applicable rule relating to the nationality of claims", as now elaborated upon in the draft articles on diplomatic protection. This leads him to conclude that "under the law of State responsibility the mechanisms of diplomatic protection are accorded pre-eminence over those of human rights law, even when the injury to the individual is caused by a violation of his or her human rights".[179] He adds that

> ... from a joint reading of the 2001 Articles on Responsibility and the 2004 Draft Articles on Diplomatic Protection, the room left for the enforcement of *erga omnes* human rights obligations beyond the traditional mechanisms of diplomatic protection appears to be minimal.[180]

86. Article 17 must dispel doubts of this kind by making it clear that the draft articles are in no way intended to obstruct other procedures for the protection of human rights. This purpose can best be served by a separate provision, like article 17. However it seems, judging by Milano's paper,[181] that it has not achieved this result. In these circumstances it might be necessary to redraft article 17 to make its purpose ever clearer — though to the Special Rapporteur it seems difficult to make this intention clearer. Perhaps this might be achieved by the proposed reformulation offered by the Netherlands[182]:

> The rights of States, natural persons or other entities to resort to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

87. It is therefore proposed that article 17 be retained as a separate provision and that it read:

> EITHER
>
> The present draft articles are without prejudice to the rights of the States, natural persons or other entities to resort [under international law[182]] to

[178] "Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition?" *Netherlands Yearbook of International Law*, vol. 35 (2004), p. 85, at pp. 103-108.

[179] Ibid., p. 106.

[180] Ibid., p. 107. Milano suggests that the odd relation between article 44 and article 48 may have been caused by an oversight on the part of the International Law Commission to specify that article 44 applies only to claims of diplomatic protection and not to article 48. Perhaps he is right!

[181] Ibid., p. 107. Milano remains unconvinced by article 17.

[182] The Netherlands suggests the deletion of this phrase on the ground that the right of States to submit an *amicus curiae* brief in domestic proceedings, as the European Union has done in United States legal cases, must remain unchanged. See Comments, p. 46.

actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

OR

The right of States, natural persons or other entities to resort to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

88. The intention of article 18 is to make it clear that the draft articles do not interfere with bilateral and multilateral investment treaties that may include different rules relating to the treatment of both individual and corporate investors. As these treaties differ substantially both in substance and form from those contemplated in article 17, it is wise to deal separately with these treaties.

89. Both Austria and Morocco object to the drafting of article 18, particularly in respect of the phrase "special treaty provisions".[183] Morocco, correctly, points out that the Vienna Convention on the Law of Treaties does not recognize the concept of "special treaties". It therefore suggests, and the Special Rapporteur recommends, that it be reformulated to read:

The present draft articles do not apply where, and to the extent that, they are inconsistent with *special regimes provided for under bilateral and multilateral treaties regarding the protection of investments*.

18. Article 19

Ships' crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection on their behalf is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.

90. Most States that have submitted comments have responded positively to article 19,[184] but have made a number of suggestions. Austria points out that the condition attached to the flag State's exercise of protection might be construed as being applicable to the right of the State of nationality of the crew members to exercise diplomatic protection. This may be overcome by splitting the provision into two sentences, as proposed below. Mexico asks the Commission to resolve the question of competing claims. The Commission has resisted this course in respect of claims by dual nationals and it would seem equally unwise or unnecessary to do it here. The Netherlands proposes that article 19 be incorporated into article 8 as they appear to belong together. This is, however, not correct. Article 8 deals with the extension of diplomatic protection to stateless persons and refugees, while article 19 recognizes the right of the State of nationality of a ship to seek redress on behalf of crew members but not to exercise diplomatic protection.

[183] Comments, pp. 47-48.

[184] Comments, pp. 48-49. Austria, Mexico, the Netherlands and Norway (on behalf of the Nordic countries).

91. The United States finds no fault with the principles expounded in article 19. However, it argues that as the right of the flag State to seek redress on behalf of crew members falls outside the field of diplomatic protection, it should not be included.[185] This issue should be considered by the Commission. On the other hand, it should be recalled that the Commission decided to include article 19 because the protection offered by the flag State is analogous to that of diplomatic protection, as recognized by the International Law of the Sea Tribunal in *The M/V "Saiga (No.2)* case,[186] and policy demands that both methods of protection be reaffirmed because ships crews are vulnerable and require all the protection they can get.[187]

92. It is proposed that, if the Commission elects to retain article 19, it should do so in its present form. Alternatively it might split the provision into two sentences to meet Austria's criticism. In this form it might read:

> The State of nationality of the members of the crew of a ship has the right to exercise diplomatic protection on their behalf. The State of nationality of a ship [The flag State?] may [similarly?] seek redress on behalf of crew members, irrespective of their nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.

The Special Rapporteur prefers the original text, as he doubts whether it is open to the interpretation placed on it by Austria.

C. The right of the injured national to receive compensation

93. The present draft articles cover only the nationality of claims and the exhaustion of local remedies. They do not deal with the primary rules of diplomatic protection, that is, the rules governing the treatment of aliens. Nor do they deal with the consequences of diplomatic protection. The limited confine of the draft articles has been debated and approved by the Commission at both its fifty-sixth and fifty-seventh sessions. The decision not to deal with the consequences of diplomatic protection can be justified on the ground that the articles on responsibility of States for internationally wrongful acts, together with their comprehensive commentary, cover most aspects of this subject.[188] Nevertheless, there is one aspect of the consequences of diplomatic protection that is not considered in the articles on responsibility of States for internationally wrongful acts, namely, the question whether there is an obligation on the successful claimant State to pay over any compensation it may have received to the injured national. The draft articles have been criticized on the ground that they have missed the opportunity to recognize such a rule, albeit by way of progressive development.[189] Speaking in the Sixth Committee on 24 October 2005, the French delegate stated that the reasons given by the Special Rapporteur as to why it was not necessary to deal with the consequences of diplomatic protection were not fully convincing. Even if diplomatic protection constituted an exception with regard to the general law on responsibility, that

[185] Comments, pp. 49-50.
[186] *Saint Vincent and the Grenadines v. Guinea*, *ITLOS Reports 1999*, p. 10, paras. 103-107.
[187] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60, commentary to draft article 19.
[188] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, articles 28-39.
[189] Milano, note 178 above, p. 108. See, too, G. Gaja, "Droits des Etats et droits des individus dans le cadre de la protection diplomatique" in J.-F. Flauss, *La Protection Diplomatique* (2003), p. 63, at p. 69.

question whether a State was under an obligation to pay over to an injured individual money that it had received by way of compensation for a claim based on diplomatic protection was fundamental.[190]

A similar point was made by Austria in its comments to the Commission:

> A further issue that deserves particular consideration is the problem of the relation between the individual whose rights are protected and the State exercising the right to diplomatic protection. It could be considered to address also the problem of the result of the exercise of diplomatic protection and the access of the individual to such a result. Of course, on the one hand, one could argue that this is a matter of the relation between a State and its nationals; on the other hand, however, it should be ensured that the injured individual in whose interest the claim was raised will benefit from the exercise of diplomatic protection.[191]

On reflection, the Special Rapporteur believes that the Commission should consider this issue, even at the eleventh hour.

98. The rule in the *Mavrommatis Palestine Concessions* case would seem to dictate that a claimant State has absolute discretion in the disbursement of any compensation it may receive in a claim brought on behalf of an injured national. If, as the rule claims, "By taking up the case of one of its subjects ... a State is in reality asserting its own rights" and becomes "the sole claimant",[192] it is difficult to argue, as a matter of logic, that any restraints are placed on the State, in the interests of the individual, in the settlement of the claim or the payment of any compensation received. As the State has "complete freedom of action",[193] it is not required to press for the full damages suffered by the injured national. Instead it may agree to a partial settlement, which often happens. This means that in practice the individual may receive as little as 10 per cent of the value of the claim.[194] In the Franco-Russian accord concluded in 1999, 99 per cent of the pecuniary rights of the natural and legal persons were conceded.[195] In 1994 the Superior Tribunal of Justice of Madrid dismissed the complaint of a national relating to the conclusion of a lump sum agreement between Spain and Morocco, holding that international practice permits the giving of indemnities less than the amount of damage.[196]

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[190] See A/C.6/60/SR.11, para. 73.

[191] Comments, p. 8.

[192] 1924 *P.C.I.J. Series A*, No. 2, at p. 12.

[193] In the *Barcelona Traction* case the International Court of Justice declared:

> "The State must be viewed as the sole judge to decide whether its protection will be granted, and to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose case is espoused, the State enjoys *complete freedom of action*" (1970) *I.C.J. Reports*, p. 3, at p. 44, emphasis added).

[194] W. K. Geck, "Diplomatic protection" in *Encyclopaedia of Public International Law* (1992), vol. 1, at p. 1058; D. Bederman, Interim report on "Lump sum agreements and diplomatic protection" in International Law Association, *Report of the Seventieth Conference, New Delhi, (2002)*, p. 230; R. Lillich, "The United States-Hungarian Claims Agreement of 1973" 69 *A.J.I.L.* (1975), p. 534; R. Lillich and B. Weston, *International Claims: Their Settlement by Lump Sum Agreements* (1975).

[195] D. Carreau, *Droit International*, 7th ed. (2001), p. 462, para. 1118.

[196] J. Pastor Ridruejo, "La pratique espagnole de la protection diplomatique" in J. F. Flauss, *La*

95. The Commission has accepted the rule in the *Mavrommatis Palestine Concessions* case as the foundation for its draft articles. Out of deference to this decision, it rejected a proposal that a State be obliged to exercise diplomatic protection to a national injured as a result of the violation of a norm of *jus cogens*. On the other hand, the logic of *Mavrommatis* does not always prevail. Both the continuous nationality rule and the exhaustion of local remedies requirement undermine the logic of *Mavrommatis* as they show that an injury to a national does not automatically confer on the claimant State a right to diplomatic protection. Nor is *Mavrommatis* logically and consistently applied in respect of the assessment of the damages claimed, as compensation is generally calculated on the basis of the injury suffered by the individual. This was acknowledged by the Permanent Court of International Justice in the *Chorzow Factory* case[97] and is now said to be a rule of customary international law.[98] The anomaly of the legal situation was recognized by Judge Morelli in *Barcelona Traction* when he stated:

> International reparation is always owed to the State and not to the private person, even in the case of compensation and despite the fact that the amount of compensation must be determined on the basis of the damage suffered by the private person.[99]

If the damage suffered is to be "determined on the basis of the damage suffered by the private person", it seems that the claimant State is obliged to consult with the injured individual on this matter, which shows that the State does not have complete freedom of action in the making of a claim.

96. State practice is contradictory on this subject. While judicial decisions, both international and national, emphasize that the injured national has no right to claim any compensation received by the State, other national mechanisms suggest that States acknowledge that there is some obligation on them to disburse compensation received to the injured national.

97. In *Administrative Decision I* the United States-German Mixed Claims Commission affirmed the wide discretion of the State:

> In exercising such control [the nation] is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammelled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised and the private owner will be bound by the action taken. *Even if payment is made to the expanding nation in pursuance of the award, it has complete control over the fund so paid to and held by it and may*

Protection Diplomatique (2001), p. 112.

[97] *Chorzow Factory Case (Merits)*, 1928 *P.C.I.J.* Series A, No. 17, p. 28: "The damage suffered by the individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State."

Professor Dubois has commented on this decision in *Revue Critique de Droit International Privé* (1978), pp. 613 and 624.

[98] D. Shelton-Stern, *Jus Cogens* and its effects in the responsibility of international organizations (1997), p. 69.

[99] *ICJ Reports*, p. 221.

to prevent fraud, correct a mistake or protect the national honour, at its election return the fund to the nation paying it or otherwise dispose of it.[200]

National courts have adopted a similar position.[201]

United Kingdom

In the *Civilian War Claimants* case,[202] the claimants petitioned the Crown for a share of the reparations paid to the United Kingdom Government by Germany pursuant to the Treaty of Versailles for damage done during the First World War. It was held that when the Crown was negotiating a treaty with another Head of State, it was inconsistent with its sovereign position that it should act as trustee or agent for its nationals unless it expressly declared that it was so acting. There was nothing in the treaty to suggest this. Rather, the treaty left it to the Governments, as between themselves and their nationals, to determine how that money was to be distributed. This decision was recently affirmed in *Lonrho Exports Ltd v. Export Credits Guarantee Department*.[203]

United States

As a matter of United States law, "the money received from a foreign Government as a result of an international award, or in settlement belongs to the United States",[204] and the distribution of indemnities is left to the goodwill of Congress.

> By cases decided by the Supreme Court of the United States, it seems to have been established that funds received from foreign Governments in settlement of claims of American citizens are national funds of the United States, that no claimant has as a matter of strict legal right any lien on funds obtained, and that Congress is not under any legal obligation to pay any claim

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[200] *United States v. Germany*, *U.N.R.I.A.A.*, vol. 7 (1925), p. 119, at p. 152. Emphasis added.

[201] See R. Jennings and A. Watts, *Oppenheim's International Law*, 9th ed. (1992), vol. 1, p. 539.

[202] [1932] A.C. 14. See also *Rustomjee v. R* (1876) 1 QBD, p. 487.

[203] [1996] 4 All E.R., p. 673, at p. 687:

> "(3) when the Crown espouses claims (eg. of nationals who are creditors of foreign State or nationals) and affords diplomatic protection (eg. by the negotiation of a treaty providing for payment to the Crown for distribution to its nationals), under international law the Crown is maintaining its own right in its own name to such protection of its nationals. ... (4) Subject to (5) below, in concluding and performing the obligations under such a treaty, the Crown does not act as agent or trustee for the nationals, and irrespective of the terms of the treaty and (as it seems to me) the characterisation of the payments of the treaty, payments made to the United Kingdom pursuant to such treaties are received by the Crown in a sovereign capacity and form the absolute property of the State. ... (6) The entitlement of the Crown to retain the payments made to it is not, as a matter of English law, affected by the terms of the treaty or whatever the Treaty may provide regarding their distribution. Nor can the terms of the Treaty affect or qualify the sovereign character of the Crown's receipt of such payments. ... The Crown under English law has no legal or equitable, but at best moral obligation to fulfil those terms. If the Crown fails to do so the only remedies lie in Parliament or (at the instance of the foreign government) in international proceedings. ... (7) The Crown in distributing any payments received pursuant to a treaty may determine the character to be borne by the payments it makes and earmark such payments. ..."

[204] American Law Institute, *Restatement of the Law (Third), Foreign Law of the United States* (1987), para. 902, pp. 348-349.

out of the proceeds of a fund, although undoubtedly there is a *moral* obligation on the Government to remit funds to persons who have suffered losses.[204]

France

In France diplomatic protection remains an "acte du gouvernement" — the last bastion of the non-rule of law — and the procedures for the attribution of indemnities have traditionally remained unsusceptible to judicial oversight.[205]

98. Despite the above assertions of the absolute right of a State to distribute compensation received as it pleases, it is not uncommon to find statements that the normal practice of a State in such a case is to pay money received to the injured individual. Geck, for example, argues that "the claimant State usually forwards to the injured individuals the damages paid by the defendant State".[207] The commentary to the Harvard Draft is to the same effect: "... the normal practice of transfer by the Claimant State to the individual claimant of any reparation it secures".[208] In order to understand statements of this kind it is necessary to examine the steps that States have taken to limit their discretion.

99. Beginning in the 1950s, States started to introduce judicial review of compensation awards. France, the United States and the United Kingdom set up Commissions for the distribution of lump-sum awards received from Eastern European States after World War II. This phenomenon was a consequence of the large number of claimants competing for a share in vastly inferior returns of the cumulative value of confiscated or nationalized private property. The distribution of the indemnity became a particularly delicate affair and it became judicious to create specialized agencies for this purpose. Each State designed a different procedure.

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[204] *Distribution of the Assigi Award*, Opinion of J. Reuben Clark, Department of State, cited in Hackworth, *Digest of International Law*, vol. V, p. 746.

[205] B. Bollecker-Stern, note 198 above, at p. 108.

[207] Note 194 above, p. 1057.

[208] F. V. Garcia-Amador, Louis B. Sohn and R. R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974), p. 121. In *Administrative Decision V*, the umpire of the Mixed Claims Commission, United States and Germany, established under the agreement of August 10, 1922, said:

> But where a demand is made on behalf of a designated national, and an award and payment is made on that specific demand, the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to account to the private claimant, on whose behalf the claim was asserted and paid and who is the real owner thereof. Broad and misleading statements susceptible of this construction are found in cases where lump-sum awards and payments have been made to the demanding nation covering numerous claims put forward by it and where the tribunal making the award did not undertake to adjudicate each claim or to allocate any specified amount to any designated claim. ... [Citations omitted.] It is not believed that any case can be cited in which an award has been made by an international tribunal in favor of the demanding nation on behalf of its designated national in which the nation receiving payment of such award has, in claims so held "in trust for citizens of the United States or others" (Note 200 above, p. 152) the absence of fraud or mistake, hesitated to account to the national designated, or those claiming under him, for the full amount of the award received. So far as the United States is concerned it would seem that the Congress has treated funds paid the nation in satisfaction of specific claims as held "in trust for citizens of the United States or others" (Note 200 above, p. 152).

United States[209]

After the Second World War, several bloc settlements led to the creation in 1949 of the International Claims Commission under the International Claims Settlement Act 1949, to deal with the distribution of lump-sum agreements concluded with Yugoslavia and later Panama, and other popular democracies which had engaged in nationalizations. It was renamed Foreign Claims Settlement Commission of the United States in 1982. Its function is to distribute funds received from foreign Governments among the various claimants, after considering each claim separately and deciding on its validity and the amount due to each claimant on the basis first, of the particular accord at issue and second, applying "applicable principles of international law, justice and equity". The Commission is quasi-judicial in nature. There is no appeal from its decisions. There is a standing appropriation for the distribution of funds received by the United States from a Foreign Government. Thus, although the money received from settlements is money belonging to the Government of the United States, Congress has usually provided for payment to private claimants, especially to those whose claims are settled in accordance with decisions of the special United States claims commission dividing a lump-sum settlement.[210]

United Kingdom[211]

The Foreign Compensation Commission was established by the Foreign Compensation Act 1950 with a view to distributing indemnities as a result of the accords concluded with Poland, Czechoslovakia and Yugoslavia. The Commission functions like an ordinary tribunal, applying domestic law. The law to be applied is determined by Orders in Council which in turn often mirror the terms of the accord in question. There is no appeal from their decisions.

France[212]

In France the system works on an ad hoc basis with a Commission for the distribution of indemnities created for each of the accords executed, starting in 1951. A Commission to deal with the creditors in the Russian loans debacle spanning from the Russian Tsarist era, was established as recently as 1998.[213] There is no general right of appeal. Although not specified, the tendency of the Commissions is to apply international law, both treaty law and customary law.

100. Not too much significance can be attached to these developments, as they reflect national legal institutions.[214] Despite this, some writers insist that they have had an impact on international law.[215]

101. Further evidence of the erosion of the State's discretion is to be found in the decisions of arbitral tribunals which prescribe how the award is to be divided.[216]

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209 *Third Restatement*, note 204 above, para. 713.

210 Ibid., para. 902.

211 J. Berlia, "Contribution à l'étude de la nature de la protection diplomatique", Annuaire Français de Droit International (1957), p. 63, at pp. 67-68.

212 Ibid.

213 Carreau, note 195 above, para. 1172.

214 Ibid., para. 1173; Reuben Clark, note 205 above, at p. 763.

215 See, for instance, Berlia, note 211 above, p. 70.

216 Bollecker-Stern, note 198 above, at p. 109.

Moreover, in 1994 the European Court of Human Rights decided in *Beaumartin v. France*[117] that an international agreement making provision for compensation could give rise to an enforceable right on the part the injured persons to compensation.

102. Although there is some support for curtailing the absolute right of the State to withhold payment of compensation received to the injured national in national legislation, judicial decisions and doctrine, it can hardly be argued that this constitutes a settled practice or that there is any sense of obligation on the part of States which has limited their freedom of disposal. Public policy, equity and respect for human rights may all support the curtailment of the State's discretion in the disbursement of compensation, but this does not constitute a rule of customary international law.

103. It is suggested, in these circumstances, that the Commission seriously consider adopting a provision on this subject as an exercise in progressive development. The present draft articles contain little progressive development. Indeed a number of respondent States have criticized them on this ground. To adopt a provision on this subject would be to remove one of the major inequities of diplomatic protection. The following proposal is placed before the Commission:

> (1) In quantifying its claim for diplomatic protection a State shall have regard to the material and moral consequences of the injury suffered by the national in respect of whom it exercises diplomatic protection. [To this end it shall consult with the injured national.]

Comment. To a large extent this provision simply codifies existing practice.

> (2) When a State receives compensation in full or partial fulfilment of a claim arising out of diplomatic protection it shall [should] transfer that sum to the national in respect of whom it has brought the claim [after deduction of the costs incurred in bringing the claim].

Comment. The Commission may prefer to use the word "should" rather than "shall" in paragraph (2). This would create an imperfect obligation for States. Such a course is known to international law. For example, article 3 of the 1958 Geneva Convention on the High Seas[118] provided that "in order to enjoy freedom of the seas on equal terms with coastal States, States having no sea coast *should* have free access to the sea". [Article 125 of the 1982 United Nations Convention on the Law of the Sea[119] states that "Land-locked States *shall* have the right of access to and from the sea ...".]

[117] No. 18287/89 [1994] ECHR 40. See, further, on the jurisprudence of the European Court of Human Rights, J.-F. Flauss, "Cour européenne et protection diplomatique" in Condorelli et al. (eds.), *Liberté, Justice et Tolérance* (2004), vol. 1, p. 815, at pp. 829-830.

[118] United Nations *Treaty Series*, 1-6465, vol. 450, p. 82.

[119] United Nations *Treaty Series*, vol. 1883, p. 3.

Annex

Post-2000 bibliography on diplomatic protection

Books

Amerasinghe, C. F. *Local Remedies in International Law*. 2nd ed. Cambridge: Cambridge University Press, 2004.

Flauss, J.-F. (ed.). *La Protection Diplomatique: Mutations Contemporaines et Pratique Nationales*. Brussels, Bruylant, 2003.

Paulsson, J. *Denial of Justice in International Law*. Cambridge: Cambridge University Press, 2005.

Storost, C. *Diplomatischer Schutz durch EG und EU?* Berlin: Dunker & Humblot, 2005.

Tiburcio, C. *The Human Rights of Aliens under International and Comparative Law*. The Hague: Marthinus Nijhoff, 2001.

Articles

Caflisch, L. "La pratique suisse de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), pp. 73-86.

Condorelli, L. "L'evolution du champ d'application de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), pp. 3-28.

Condorelli, L. "La protection diplomatique et l'evolution de son domaine d'application". *Revista di Diritto Internazionale* 86 (2003), pp. 5-26.

Deen-Racsmany, Z. "Diplomatic protection and the *La Grand* case". *Leiden Journal of International Law* 15 (2002), pp. 87-104.

Dominice, C. "La pretention de la personne privée dans le systeme de la responsabilite internationale des Etats" in *Studi di Diritto Internazionale in Onore di Gaetano Arangio-Ruiz* (2003), pp. 729-745.

Dominicé, C. "Regard actuel sur la protection diplomatique" in *Liber Amicorum Claude Reymond* (2004), pp. 73-81.

Dominicé, C. "L'arret *Avena* et le sort judicaire des droits individuels" in *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress* (2005), pp. 55-62.

Duchesne, M. S. "The continuous-nationality-of-claims principle: its historical development and current relevance to Investor-State Investment Disputes". *George Washington International Law Review* 36 (2004), pp. 783-815.

Dugard, J. "Diplomatic protection and human rights: the draft articles of the International Law Commission". *Australian Yearbook of International Law* 24 (2005), pp. 75-91.

Erasmus, G. and Davidson, L. "Do South Africans have a right to diplomatic protection?". *South African Yearbook of International Law* 25 (2000), pp. 113-130.

Feria Tinta, M. "Due process and the right to life in the context of the Vienna Convention on Consular Relations: arguing the *La Grand* case". *European Journal of International Law* 12 (2002), p. 363.

Ferrari Bravo, L. "La pratique italienne de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), pp. 87-92.

Flauss, J.-F. "Vers un aggiornamento des conditions d'exercise de la protection diplomatique?" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), pp. 29-62.

Flauss, J.-F. "Protection diplomatique et protection internationale des droits de l'homme". *Revue Suisse de Droit International et Européen* (2003), pp. 1-37.

Flauss, J.-F. "Contentieux européen des droits de l'homme et protection diplomatique" in L. Condorelli (ed.), *Libertés, Justice et Tolérance: Mélanges en Hommage au Doyen Gerard Dohen-Jonathan* (2004), pp. 813-838.

Flauss, J.-F. "Les contentieux des décisions de refus d'exercise de la protection diplomatique". *Revue Generale de Droit International Public* 109 (2005), pp. 407-419.

Forcese, C. "Shelter from the storm: rethinking diplomatic protection of dual nationals in modern international law". *George Washington International Law Review* 37 (2005), pp. 469-500.

Gaja, G. "Is a State specially affected when its nationals human rights are infringed?" in L.C. Vorah et al. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honor of Antonio Cassese* (2003), pp. 375-382.

Gaja, G. "Droits des Etats et droits des individus dans le cadre de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), pp. 63-69.

Hopkins, K. "Diplomatic protection and the South African Constitution". *SA Public Law* 16 (2001), pp. 387-395.

Iovane, M. "The 55th session of the International Law Commission". *Italian Yearbook of International Law* 13 (2003), pp. 175-177.

Kooijmans, P. H. "Is the Right to Diplomatic Protection a Human Right?" in *Studi di Diritto Internazionale in Onore di Gaetano Arangio-Ruiz* (2003), pp. 1975-1984.

Kunzli, A.M.H. "Case concerning Mexican nationals". *Leiden Journal of International Law* 18 (2005), pp. 49-64.

Malenovsky, J. "La pratique de la protection diplomatique dans les P.E.C.O., en République Tchèque en particulier" in J.-F. Flauss, *La Protection Diplomatique* (2003), pp. 93-107.

Milano, E. "Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition". *Netherlands Yearbook of International Law* 35 (2004), pp. 85-142.

Pastor Ridruejo, J. "La Pratique espagnole de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), pp. 109-113.

Paulsson, J. "Continuous nationality in *Loewen*". *Arbitration International* 20 (2004), pp. 213-215.

Pellet, A. "Human Rightism and International Law". *Italian Yearbook of International Law* 10 (2001), p. 3.

Pinto, M. "De la protection diplomatique et la protection des droits de l'homme". *Revue Générale de Droit International Public* 106 (2002), pp. 513-547.

Puissochet, J.-P. "La pratique française de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), pp. 115-120.

Ress, G. "La pratique allemande de la protection diplomatique" in J.-F. Flauss (ed.), *La Protection Diplomatique* (2003), pp. 121-151.

Santulli, C. "Travaux de la Commission du droit international". *Annuaire Français de Droit International* (2000), pp. 424-426; (2001), pp. 369-378; (2002), pp. 561-564; (2003), pp. 442-446.

Santulli, C. "Entre protection diplomatique et action directe: la représentation" in *Colloque du Mans: Le Sujet en Droit International* (2005), pp. 85-98.

Schermers, H. "Exhaustion of domestic remedies" in N. Ando et al. (eds.), *Liber Amicorum Judge Shigeru Oda* (2002), pp. 947-975.

Spiermann, O. "The *La Grand* case and the individual as a subject of international law". *Zeitschrift für öffentliches Recht* 58 (2003), pp. 197-221.

Storost, C. "Der Fall Abbasi: Wegbereiter eines gemeineuropäischen Anspruchs auf diplomatischen Schutz?". *Archiv des Volkerrechts* 42 (2005), pp. 422-424.

Warbick, C. and McGoldrick, D. "Current developments in public international law". *International and Comparative Law Quarterly* 51 (2002), pp. 723-733.

Wittich, S. "Direct injury and the incidence of the local remedies rule". *Austrian Review of International and European Law* 5 (2000), pp. 121-187.

Zieck, M. "Codification of the law of diplomatic protection: the first eight draft articles". *Leiden Journal of International Law* 14 (2001), pp. 209-232.